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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE PROCTER & GAMBLE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 18, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 19-40) is reported at 358 F. 2d 74. The decision and final order of the Commission (App. C, *infra*, pp. 43-127; J.A. 388a-465a) are reported at CCH Trade Reg. Rep. (FTC Transfer Binder 1963-1965), ¶ 16,-673, but are not yet officially reported. An earlier

interlocutory decision of the Commission in this case (J.A. 249a-255a [1]) is reported at 58 F.T.C. 1203.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 41-42) was entered on March 18, 1966. On June 14, 1966, Mr. Justice Stewart entered an order extending the time for filing a petition for a writ of certiorari to and including July 15, 1966. We invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1) and Section 11(c) of the Clayton Act, as amended, 15 U.S.C. 21(c).

QUESTION PRESENTED

Whether the Federal Trade Commission correctly held that the acquisition of the dominant producer of household liquid bleach by The Procter & Gamble Company—a very large producer of a variety of closely related products—violated Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Fed-

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[1] "J.A." references are to the joint appendix filed in the court below, copies of which have been lodged with this Court.

> eral Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 11(a) of the Clayton Act, 38 Stat. 734, as amended, 64 Stat. 1125, 15 U.S.C. 21 (a), provides:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested * * * in the Federal Trade Commission where applicable to all other character of commerce * * *.

STATEMENT

On October 7, 1957, the Federal Trade Commission issued a complaint (J.A. 15a) charging that on or about August 1, 1957, The Procter & Gamble Company had acquired the assets of Clorox Chemical Company, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. (J.A. 20a-21a.) Following evidentiary hearings, the hearing examiner, on June 17, 1960, rendered his decision (J.A. 179a), in which he concluded that the acquisition was unlawful and ordered divestiture (J.A. 242a-246a). On appeal, the Commission, on June 15, 1961, reversed (J.A. 249a-255a, 58 F.T.C. 1203), holding that the record as then constituted was inadequate, and remanding the case to the examiner for additional evidentiary hearings. These were held, and on February 28, 1962, the examiner rendered his second decision (J.A. 287 a), in which he again held the acquisition unlawful

and ordered divestiture (J.A. 367a-372a). Procter again appealed, and the Commission, in a lengthy opinion (J.A. 391a), affirmed the examiner and entered a final order of divestiture (J.A. 388a-391a). The Court of Appeals for the Sixth Circuit reversed and directed that the Commission's complaint be dismissed (App. A, *infra*, pp. 19-40).

The factual findings of the Commission show that at the time of the acquisition Clorox, the acquired company, was the nation's dominant producer of household liquid bleach.[2] With annual sales of slightly less than $40 million, it had 50 percent of all sales of this common household product, and its share had been growing steadily (J.A. 395a). In some areas of the country, Clorox's share was greater than 50 percent; for example, it had 72 percent of all household liquid bleach sales in the middle Atlantic States (J.A. 397a).

The liquid bleach industry was highly concentrated. Clorox and its three major competitors accounted among themselves for almost 75 percent of the industry's total sales (J.A. 396a); only Clorox, however, sold throughout the nation (J.A. 397a). Most of the remaining manufacturers of liquid bleach were very small (J.A. 396a).

All household liquid bleaches are chemically identical,[3] and Clorox bleach is not intrinsically superior to

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[2] The parties are agreed that household liquid bleach is the relevant line of commerce in this case (App. A, *infra*, p. 26).

[3] Household liquid bleach is a 5¼-percent sodium hypochlorite solution (J.A. 395a, 398a).

competing liquid bleaches (J.A. 398a, 728a). Nor is it cheaper; it is, on the contrary, a "premium" bleach (J.A. 398a). Its market preeminence is thus apparently due to extensive and prolonged advertising in the mass media (J.A. 398a-399a). Clorox spent an amount equal to 10 percent of its sales on advertising (J.A. 399a).

Procter, the acquiring company, is a very large diversified producer of consumer products. Its total sales in 1957 exceeded $1 billion (J.A. 400a), and its sales of soaps, detergents and cleansers alone—products closely related in use and marketing methods to household liquid bleach (J.A. 406a)—were more than $500 million (J.A. 400a-401a). It was, moreover, the leading seller of household cleansing agents, accounting, for example, for 54.5 percent of the nation's $760 million packaged-detergents industry and, with two other large firms—Colgate-Palmolive and Lever Brothers—for 80 percent (J.A. 401a). In addition, Procter was the nation's largest advertiser, spending in 1957 more than $125 million for advertising and consumer promotions; its advertising expenditures alone were twice as large as Clorox's total sales that year (J.A. 401a, 395a).

The Commission found that the acquisition of Clorox by Procter would be substantially harmful to competition in the liquid bleach industry because the substitution of Procter for Clorox as the dominant bleach producer would discourage new competitors from entering the field and existing sellers of liquid bleach from attempting to compete vigorously with

Clorox (J.A. 440a-441a). Although advertising was apparently an important factor in the rise of Clorox to its position of dominance, prior to its acquisition by Procter, Clorox was a relatively small, single-product firm, incapable of truly massive advertising and consumer promotions, and ineligible for the substantial discounts that the mass media make available to very large national advertisers like Procter (J.A. 434a-435a). As the result of the acquisition, the Commission found, Clorox for the first time was able to enjoy the considerable marketing advantages that large multi-product firms like Procter possess—for example, advantages of price, programming flexibility, and sponsorship in national television advertising, and virtually limitless financial resources to support large advertising budgets and to enable costly, but highly effective, consumer promotion campaigns using coupons, premiums, and like devices (J.A. 400a, 433a-438a). The Commission concluded that Procter would have substantially greater power in the liquid bleach market than Clorox had had, and that, whether or not Procter exercised its power, the small firms in the industry and potential entrants would be deterred from challenging the dominant market position of the Procter-Clorox combine (J.A. 440a-442a).

The Commission also found that the merger would substantially impair the prospects for competition in the liquid bleach industry by eliminating Procter as a potential competitor (J.A. 454a-455a). Observing that the threat of new entry often acts as an important and salutary restraint upon anti-competitive

behavior by oligopolists, and that the liquid bleach industry was highly oligopolistic at the time of the merger, the Commission pointed out that, prior to the merger, Procter was the most likely prospective entrant. Well entrenched in closely related product lines, Procter carefully considered entering the liquid bleach industry on its own (J.A. 402a-403a). Had it not purchased Clorox, it would have remained a threat to Clorox's dominance, because it would have had the capability of entering, and the incentive to enter, the bleach industry in the event that Clorox tried to exploit its dominant position.

In reversing the Commission, the court of appeals did not disturb the Commission's factual findings. It rejected, however, the inferences of competitive harm which the Commission drew. It held the Commission's conclusion that the merger eliminated an important source of potential competition vitiated because "[t]here was no reasonable probability that Procter would have entered the household liquid bleach market but for the merger" (App. A, *infra*, p. 36), and it overturned the Commission's conclusion that the merger strengthened Clorox's dominance in the industry because it thought that this conclusion rested upon mere conjecture and upon a general hostility to bigness in business, that the Commission had failed to show that Procter would engage in anti-competitive conduct, and that the Commission had failed to give adequate weight to the fact that in 1961 (after the merger) the market share of Clorox bleach declined slightly (App. A, *infra*, pp. 32, 34, 37).

In the court of appeals, Procter also challenged the Commission's decision on procedural grounds—alleged reliance by the Commission on matter *dehors* the record, and the Commission's allegedly improper failure to adhere in its second decision to the principles of its earlier interlocutory decision. On these issues, the court upheld the Commission. (App. A, *infra*, pp. 22-23.)

REASONS FOR GRANTING THE WRIT

This case presents exceedingly important questions in the administration of the merger law. The narrow question is whether the Federal Trade Commission exceeded its authority in finding that the acquisition by a large diversified producer of heavily advertised consumer products (Procter) of a smaller producer (Clorox) which was dominant in a related product line where concentration was already great violated Section 7. More broadly, the issue is the proper legal standard for judging conglomerate mergers of this general type, involving firms in related product lines. The Commission did not suggest in its opinion—and we do not suggest here—that all such mergers are within the ban of Section 7. But some of them—and very clearly, we submit, the merger of Procter and Clorox—pose very substantial dangers to competition, and the Commission attempted in this case to formulate appropriate criteria of legality. In reversing the Commission, the court of appeals below purported merely to be appraising the evidentiary support for the Commission's findings. It is demonstrable, however, that in fact the court rejected the Commission's

standard and instead adopted a standard which, unless reversed, will prevent the Commission and the Department of Justice from vindicating the purposes of Congress in this area.

I.

As we shall urge in the second part of this discussion (*infra*, pp. 11-17), the decision below is erroneous, in conflict with the holding of another circuit, and manifestly contrary to the teachings of several recent decisions of this Court. But, in all events, there can be, we believe, no serious doubt of the importance of the issue, or of the suitability of the present case for resolving it authoritatively.

The Commission's limited resources for merger enforcement are heavily committed to conglomerate mergers involving firms in related product lines.[4] It recently found one unlawful in *General Foods Corp.*, 3 CCH Trade Reg. Rep., ¶ 17,465, relying heavily on its opinion in the instant case. An earlier decision invalidating a similar merger was affirmed in *Ekco Products Co.* v. *Federal Trade Commission*, 347 F.2d 745. (C.A. 7). See, also, *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F. 2d 223 (C.A. D.C.); cf. *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592. And the Commission has a number of other, similar acquisitions under active investigation with a view to issuance of formal com-

[4] The Commission in its opinion in this case suggested the definition "product extension" for a merger between "sellers of functionally closely related products * * * that may enable significant integration in the production, distribution or marketing activities of the merging firms" (J.A. 404a).

plaints. Thus the decision below casts a serious cloud over a major law enforcement program.

A few statistics will indicate the importance of this program in the overall enforcement of the merger law. This Court in its prior decisions under the amended Section 7 has dealt mainly with "horizontal" mergers—those between direct competitors.[5] Yet, between 1960 and 1964 (the latest period for which adequate figures are available), the Bureau of Economics of the Federal Trade Commission estimates that only 12 percent of all acquisitions of firms, like Clorox, having assets of more than $10 million—major acquisitions, in other words—were horizontal (down from 31 percent in 1948-1953); 52.9 percent (up from 46.6 percent in the earlier period) were conglomerate mergers between firms that, like Procter and Clorox, did not sell competing products. Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pursuant to S. Res. 40, Pt. 2, p. 516. The trend of major acquisitions is plainly toward conglomerate mergers of this type.

Of course, not all—or even most—such mergers are harmful to competition. But it is plain that the government must have adequate legal tools to deal with those that are. Thus it is imperative that this Court clarify the application of Section 7 in this vital area. The present case is especially suitable

[5] The only conglomerate case was *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, where the Court upheld the Commission's determination that the challenged merger was illegal because it fostered reciprocal buying.

for this purpose. The question of the proper legal standards to govern these mergers is presented here in a particularly clear-cut form. Not only did the Commission in its landmark opinion make an exhaustive analysis of the problem and suggest appropriate standards, but the court of appeals did not disturb the Commission's factual findings, albeit it differed in its interpretation of their legal significance. The issues thus emerge well defined.

II.

The Commission's reasoning, in concluding that Procter's acquisition of Clorox violated Section 7, may be briefly summarized as follows. Clorox, with a 50 percent market share (considerably higher in some regions), was the dominant producer in the highly concentrated liquid bleach industry, but, withal, a relatively small company; neither a giant nor a diversified firm, it did not completely overshadow its competitors. In an industry so highly oligopolistic, even a slight increment in the market power of the dominant firm would be exceedingly dangerous to competition (cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365, n. 42), and the substitution of Procter for Clorox greatly enhanced the latter's power and increased significantly the barriers to entry into the liquid bleach industry, principally by strengthening Clorox vis-à-vis its competitors and potential competitors in the crucial area of advertising and marketing. (See Statement, *supra*, pp. 5-6.)

The essential grounds of the court of appeals in rejecting the Commission's reasoning and result were three. Each, we submit, is unsound. Together they compose a legal standard that would foreclose all ef-

fective enforcement action against conglomerate mergers.

1. The court deemed the Commission's analysis of the deterrent effect upon small competitors and prospective entrants of Procter's substitution for Clorox mere conjecture. As this Court has repeatedly pointed out, however, Section 7 requires a prediction of the future effects, the likely long-term impact, of a challenged merger (see, *e.g.*, *United States* v. *Von's Grocery Co.*, 384 U.S. 270), and Congress gave the difficult and exacting task of making such predictions—which inevitably involve an element of guesswork or conjecture—to the Commission, not the reviewing courts (see *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 600). We submit that there was a rational basis for the Commission to conclude that the dramatic changes in the conditions of competition in the liquid bleach industry wrought by Procter's substitution for Clorox were likely to impair competition substantially; and that the court of appeals was without power to substitute its own predictions as to the likely future course of competition in the indsutry.

2. The court below thought that the Commission should have demonstrated that Procter will in fact employ its vast marketing and financial power in Clorox's behalf. The Commission, however, carefully explained why such proof was unnecessary to show that the merger would probably have a deterrent effect upon small competitors and prospective entrants (J.A. 441a-442a):

> We need not attempt to ascertain or predict whether, and to what extent, Procter has taken

or will take active steps to obtain for Clorox the potential scale or other advantages accruing from the merger. As has been pointed out, the conditions which retard competition in an industry are to an important degree psychological. They stem from competitors' appraisal of each other's intentions, rather than from the intentions—or the actions taken upon them—themselves. The appropriate standpoint for appraising the impact of this merger is, then, that of Clorox's rivals and of the firms which might contemplate entering the liquid bleach industry. To such firms, it is probably a matter of relative indifference, in setting business policy, how actively a Procter-owned Clorox pursues its opportunities for aggressive, market-dominating conduct. The firm confined by the high costs of shipping liquid bleach, and the high costs of national or regional advertising, within a geographically small area, cannot ignore the ability of a firm of Procter's size and experience to drive it out of business (not necessarily deliberately) by a sustained local campaign of advertising, sales promotions and other efforts. * * * A small or medium-sized firm contemplating entry cannot ignore the fact that Procter is a billion-dollar corporation whose marketing experience extends far beyond the limited horizons of the liquid bleach industry and whose aggregate operations are several times greater than those of all the firms in the industry combined. Even a large firm contemplating entry into such an industry must find itself loath to challenge a brand as well-established as Clorox bleach, when that brand is backed by the powerful marketing capacities of a firm such as Procter.

3. The court below attached great weight to the post-acquisition evidence in the record. But, precisely because the anti-competitive effects of the merger do *not* depend on Procter's actually exploiting its power in the liquid bleach industry (see discussion under point 2, *supra*), it is immaterial that Procter in the few post-acquisition years covered by the record operated Clorox much as it had been operated before the acquisition. Moreover, the actual operation and effects of the Procter-Clorox combine are not fairly to be tested by reference solely to a post-acquisition period during which the government was actively challenging the merger and seeking divestiture. *United States* v. *Continental Can Co.*, 378 U.S. 441, 463. As for the evidence, so heavily stressed by the court below, that Clorox's market share declined by 0.2 percent in one of the years (1961) following the acquisition (App. A, *infra*, p. 34), it was entitled to little weight. Even a dominant firm must suffer occasional minor vicissitudes. Respondent's own figures show that Clorox's market share increased from 48.4 percent to 5.19 percent between the year of the merger (1957) and the last year for which the record contains evidence (1961) (J.A. 402X; see J.A. 462a).[6]

In sum, the Commission was warranted in finding that the substitution of Procter for Clorox greatly enhanced the latter's formidable status; and this drastic change in the competitive environment amply justified the Commission's prediction that in

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[6] We emphasize that the Commission did not ignore the post-acquisition evidence. It considered it carefully and decided that it supported, rather than undermined, its analysis of probable anti-competitive effect (J.A. 462a-464a).

the long run competition is likely to suffer substantially. To require that the Commission go further and prove that Procter will in fact exploit its power is to require the impossible; to demand proof that existing competitors will be made more cautious, and that potential entrants will be deterred by Procter's presence in the place of Clorox, is to ask for a belaboring of the obvious. The effect of the decision below is to deny Section 7 its prophylactic function and render virtually meaningless Congress' expressed intent that the statute embrace conglomerate as well as horizontal and vertical mergers. See H. Rep. No. 1191, 81st Cong., 1st Sess., p. 11; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317; J.A. 409a.

The court of appeals also erred, we submit, in rejecting the Commission's additional point that the merger harmed competition by eliminating Procter as a potential competitor in the sale of household liquid bleach. The court thought this point vitiated by lack of proof that Procter was actually likely to enter the liquid bleach market on its own, assuming the merger route were blocked. The Commission itself declined "to speculate on * * * whether or not Procter, had its acquisition of Clorox been blocked, would in fact have entered the bleach industry on its own" (J.A. 455a). For, it pointed out, the value of potential competition as a salutary restraint upon abuses of power by monopolists and oligopolists (like Clorox) lies not only in the likelihood that the potential competitor will soon become an actual one; the threat of future entry itself is a restraint, even if the threat does not

soon materialize. This is because an oligopolist faced by such a threat will, as a matter of common business sense, avoid conduct calculated to attract the potential competitor into the market—like raising prices too far above the competitive level. It was thus quite appropriate for the Commission to conclude that Clorox's dominance was limited by the indisputable fact that Procter was ready, willing and able to produce liquid bleach itself in competition with Clorox if entry became attractive.

Such is the teaching of *United States* v. *Continental Can Co.*, 378 U.S. 441, 465-466, where the Court pointed out that the mere "possibility" of new competition "over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive level." Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 659, where the Court noted that "the mere efforts of Pacific Northwest to get into the California market, *though unsuccessful*, had a powerful influence on El Paso's business attitudes within the State" (emphasis added). And in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, the court observed that, even if a firm is not likely to enter the market immediately, the fact that it appears to await only an opportune moment to do so is highly significant; a violation of Section 7 may therefore be predicated upon the elimination of "the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter." (378 U.S. at 173).

In this respect, absence of any internally manifested intent to enter the market is unimportant. What matters is not what Procter's officials in fact thought of entering the liquid bleach industry other than by acquiring Clorox, but the objective appearances—all that Clorox had to go on. To Clorox, Procter was, surely, a continuing threat to enter. Indeed, a more likely entrant on a large scale into that industry is hard to conceive.

We note finally that in *Ekco Products Co.* v. *Federal Trade Commission*, 347 F. 2d 745, the Seventh Circuit, upon facts strikingly similar to those at bar, upheld the Commission's finding that the acquiring company (Ekco) was a " 'prime prospect to enter the commercial meat-handling equipment field on its own and offer McClintock [the acquired company] effective competition.' " (347 F. 2d at 752). There, as here, the acquiring company was a large diversified manufacturer of products closely related to those of the acquired firm and marketed through the same channels of distribution, and there, as here, officials of the acquiring company regarded the acquisition as a logical extension of its existing operations. We submit that the decisions of the Seventh Circuit in *Ekco* and the decision of the Sixth Circuit below cannot be reconciled, and we urge this Court to resolve the conflict.

CONCLUSION

This is a pilot case of major significance in an area of antitrust that is of rapidly growing importance. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1966.

APPENDIX A

No. 15769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE PROCTER & GAMBLE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Decided March 18, 1966.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and GREEN,* District Judge.

WEICK, Chief Judge. This is a proceeding to review an order of the Federal Trade Commission requiring the Procter & Gamble Company to divest assets of Clorox Chemical Company alleged to have been acquired by it in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18.

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* Honorable Ben C. Green, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

The complaint filed by the Federal Trade Commission was served on October 7, 1957. It alleged that Procter is the leading producer in the United States of soap and detergent products, which it sells under brand names, and a major producer of other consumer products sold under brand names. The complaint further alleged that on August 1, 1957 Procter acquired Clorox Chemical Company which was the nation's largest producer of household liquid bleach, and that Clorox sold its product nationally under the trade name of "Clorox". The complaint further alleged that Procter's acquisition of Clorox may substantially lessen competition or tend to create a monopoly in the sale of household liquid bleaches, in violation of Section 7 of the Clayton Act.

Procter filed an answer admitting its acquisition of the assets of Clorox, but denying the alleged probable anti-competitive effects of the acquisition and denying that it violated Section 7 of the Clayton Act.

Following hearings before a hearing examiner over a period of about fourteen months, the examiner issued his initial decision on June 17, 1960, finding that the acquisition violated Section 7 of the Clayton Act and ordered divestiture.

Appeals were taken to the Commission and on June 15, 1961, in a per curiam opinion, the Commission set aside the initial decision of the examiner because the record as presently constituted did not provide an adequate basis for determining the legality of the acquisition. It recognized that under such circumstance it might dismiss the complaint, but concluded that the public interest would be better served by remanding the case for the taking of additional evidence. It stated that the remand would afford a more complete post acquisition picture and allow "the Commission an informed hindsight upon which it can

act rather than placing too strong a reliance upon treacherous conjecture."

The hearing examiner was directed to receive evidence relating to the competitive situation as it presently exists in the liquid bleach industry and was instructed that the evidence should relate to events occurring since November, 1958, and should include market share data in geographical regions, as well as information directed to more clearly delineating the production and merchandising facilities and techniques utilized by Clorox under the control of Procter.

Prior to the hearing on the remand Procter filed a complaint in the United States District Court for the District of Columbia, to enjoin the Commission from proceeding with the remand. Its motion for a temporary restraining order was denied on the Commission's representation that the remand proceeding would take no more than two days. The action was later dismissed. The remand hearing was held and completed in two days. The hearing examiner rendered his second initial decision on February 28, 1962, which, like his first initial decision, found against Procter and ordered divestiture.

On the second appeal to the Commission, it ordered reargument on all contested issues of fact and law presented by the entire record and not merely by the record on the remand. The Commission in a 74 page opinion decided against Procter, adopting substantially the hearing examiner's findings and recommendations, except that it permitted Procter to divest the acquired assets by means of a spin-off.

Procter presents two questions here, namely, (1) whether the Commission's conduct of the proceeding and its reliance on matters de hors the record violated the Clayton and Administrative Procedure Acts and denied Procter due process of law; and (2)

whether there was substantial evidence that the acquisition violated Section 7 of the Clayton Act. We will discuss these questions in the order presented.

The Commission's Conduct of the Proceeding

As has been noted, the Commission rendered two decisions in this case. In the interim between the decisions the personnel of the Commission changed, so that only one Commissioner participated in both decisions.

Procter argues that since the Commission found in its first decision that the record did not form an adequate basis for determining the legality of the acquisition, it should have dismissed the complaint instead of remanding the case to the hearing examiner for further hearings.

Although it is true that the Commission could have dismissed the complaint, in our opinion it was not required to do so. It had the power, in its discretion, to order a remand and to permit the introduction of additional evidence. The Commission's first decision was not a final decision. The case was still pending before the Commission. At best, its first decision was interlocutory in nature and was subject to reconsideration and change. *Kirk* v. *Olson*, 245 U.S. 225 (1917); *Cia Mexicana DeGas* v. *F.T.C.*, 167 F.2d 804 (5th Cir., 1964); 2 Am.Jur. 2d, Administrative Law, § 522.

Procter relies on *Texaco, Inc.* v. *F.P.C.*, 336 F.2d 754 (D.C. Cir., 1964), where the Commission was criticized on this and on another ground. The Supreme Court, however, vacated the order of the Court of Appeals directing that the complaint be dismissed and remanded the case for further proceedings. In any event, it does not appear to us that the Court of Appeals set aside the order because of the Commis-

sion's conduct alone. 381 U.S. 739 (1965). The Supreme Court's treatment of Texaco does not support Procter.

The Commission's Alleged Reliance on Matters De Hors the Record

Procter asserts that the Commission's decision was based upon economic theories drawn from extra-record writings and was therefore violative of due process. It states that the decision was premised and critically based upon 85 citations of 43 extra-record writings which purport to deal with economic, political and social concepts.

These cited writings were general in nature. None of them dealt with the facts in the present case. At no place in its opinion did the Commission regard the citations as evidence. There was no citation of any economic writings by the hearing examiner in his second initial decision, which adopted findings of fact and comprises about 88 pages of the record. The hearing examiner's first initial decision cites no such authority. The Commission apparently cited these writings to demonstrate that its decision comported with economic authority. The Supreme Court has cited and relied on economic writings in its consideration of Section 7 cases. *F.T.C.* v. *Consolidated Foods*, 380 U.S. 592 (1965); *United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). See also *Ekco Products Co.* v. *F.T.C.*, 347 F.2d 745 (7th Cir., 1965); *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F.2d 800 (9th Cir., 1961).

We find no error in this respect.

Was There Substantial Evidence That the Acquisition of Clorox by Proctor Was Reasonably Likely to Result in A Substantial Lessening of Competition in Violation of Section 7 of the Clayton Act?

It is difficult for us to harmonize the two decisions of the Commission in this case.

The decision of the first Commission set aside the first initial decision of the hearing examiner because the record as then constituted did not provide an adequate basis for determination of the legality of the acquisition. This is another way of saying that the evidence was insufficient to support a finding of illegality. The remand was for the sole purpose of taking post-acquisition evidence from which the Commission could rely on "informed hindsight" rather than "upon treacherous conjecture." The only evidence taken on the remand related to post-acquisition conditions.

The second Commission, contrary to the ruling of the first Commission, was of the view that the post-acquisition evidence was of little value and was admissible only in an unusual case (not the present case). It did discuss a portion of the post-acquisition evidence and stated that if it was considered it might furnish support for the findings which it made on the basis of other factors. It also mentioned that none of the phenomena (post-acquisition evidence) proved that the merger was unlawful. It stated that there had been no "dramatic" change in market structure or behavior in the years since the merger and that there was no basis for according the post-acquisition evidence particular weight since it "found its way, needlessly, into the record." The post-acquisition evidence will be discussed more in detail later.

The second Commission's decision was based entirely on the record submitted to the first Commission,

which that body had ruled to be insufficient to support a finding of illegality.

We must determine whether the findings contained in the opinion of the second Commission which conflict with those of the first Commission, are supported by substantial evidence.

Procter is an Ohio corporation. At the time of the acquisition it was the nation's largest domestic manufacturer of soaps, detergents, and cleansers. It also manufactured and sold some food products, paper products, shampoos, dentifrices, and home permanents. It had assets in excess of one-half billion dollars, and annual sales of $1.15 billion. It was an old, well managed and highly successful company, having some 56,000 shareholders.

Clorox Chemical Co. on the other hand was a relatively small company as compared with Procter. It was organized in 1928, and manufactured, distributed and sold a single product, "Clorox," a household liquid bleach which was used as a whitener as well as a disinfectant. Clorox was the largest producer of such bleach in the country.

During the period of five years prior to the merger, Clorox had a steady and continuous growth in sales, profits, and net worth. It had total assets (depreciated book value) of over $12,000,000, of which $4,000,000 was liquid, and had an earned surplus of over $7,000,000. It had annual sales of slightly less than $40,000,000, which constituted 48.8% of the national sales of liquid household bleach. It had thirteen plants located throughout the country, and was the only producer of bleach that distributed on a national scale. It employed no salesmen but marketed its product solely through brokers or distributors.

The merger negotiations were initiated by shareholders of Clorox, and after study for almost two

years by Procter, they ripened into a merger, whereby Procter exchanged 639,578 shares of its common stock, worth about $30.3 million, for the assets of Clorox, which were transferred to a Procter subsidiary.

Household liquid bleach is manufactured by a relatively simple process. Chlorine is introduced into a caustic soda solution, the resulting chemical reaction being one which forms sodium hypochlorite. The bleach consists of 5¼% hypochlorite and 94¾% water. The bleach retails for about fifteen to nineteen cents per quart. It is a low priced, high turnover item, sold mainly to housewives, in grocery stores and supermarkets. Because of the weight of both the product and its container, as reflected in the high cost of shipping, it has been found feasible to market the bleach mostly in areas not more than three hundred miles from the location of its manufacture.

Procter had never engaged in the manufacture or distribution of household liquid bleach prior to the merger and there is no evidence that it ever planned to do so on its own. It was not a competitor, supplier or customer of Clorox.

There was no dispute between the parties over the line of commerce or the section of the country. The line of commerce was household liquid bleach and the section of the country was the nation and a series of regional markets.

The following table shows the market shares prior to the merger of the six leading producers of household liquid bleach, and about two hundred small producers appearing under the title of "all other brands." The "All other brands" also include chain stores and supermarkets who sell their own private brands, and account for about 20% of the market.

"Market Shares of Household Liquid Bleach Manufacturers

(Consumer Dollar Basis)

Brand	*Percentage of Total U.S. Sales*
Clorox	48.8
Purex	15.7
Roman Cleanser	5.9
Fleecy White	4.0
Hilex	3.3
Linco	2.1
Total	79.8
All Other Brands	20.2"

The two hundred producers were mostly small concerns or individuals, some of whom were characterized as small "garage" or "down cellar" bleach producers. Only eight of such producers had assets in excess of $1,000,000 and very few had assets of more than $75,000.

The market shares of the six leading producers on a consumer dollar basis for the nine principal territories are shown on the table appearing at the end of this opinion as Appendix "A".

Although there was evidence that all producers use the same formula in the manufacture of liquid household bleach, Clorox attributed its success to its maintaining a high degree of quality control in its production process. The fact that prior to the merger its sales accounted for nearly fifty per cent of the market, would seem to indicate its product's wide acceptance and preference by housewives. The Commission, on the other hand, attributed the success of Clorox to extensive advertising. Clorox did spend about ten per cent of its sales in advertising. But even though the advertising was extensive, the product had to be

good in order for it to obtain repeat-purchases by the housewife. This is demonstrated by the fact that large chains like A&P and Safeway Stores carry Clorox on their shelves even though they market their own private brands of bleach.

The Commission was of the opinion that the household liquid bleach market was highly concentrated, with barriers making it virtually impossible to be penetrated nationally. It probably would be difficult to penetrate this market on a national scale without the expenditure of a large sum of money. There is no evidence that anyone has ever tried it. Clorox was the only producer in that field. The fact that the bleach is a low cost, high turnover item, with accompanying small profits, requiring many factories in strategic locations, would probably act as a deterrent. We would doubt that a small company like Clorox, with assets of only $12,000,000, would deter large companies like Lever Brothers and Colgate-Palmolive Peet Co., (Procter's large competitors) from entering the field on a national basis if they concluded that the profits were sufficiently attractive to justify the expenditure required. We would think that any concern desiring to enter the household liquid bleach market would probably try it on a regional basis.

The fact that in addition to the six named producers sharing eighty per cent of the market, there were two hundred smaller producers, both prior and subsequent to the merger, would not seem to indicate anything unhealthy about the market conditions. And the post-merger evidence was to the effect that the other producers subsequent to the merger were selling more bleach for more money than ever before.

It was the position of Procter that it merely supplanted Clorox in the market and that the merger

did not increase the market share of Clorox because Procter was not in that market.

The Commission points out that with Procter's huge finances, its know-how in the manufacturing and marketing of its own products, its eighteen hundred salesmen, and its ability to obtain discounts in advertising, it is in a much better position than Clorox to compete with all the bleach competitors, and that Procter could sell for lower prices (even below cost) and this would probably lessen competition.

But Clorox, and not Procter, had the know-how in the household liquid bleach business as evidenced by its success in starting from scratch and building a $12,000,000 corporation with sales of nearly $40,000,000 annually and obtaining over forty-eight per cent of the market. The finances of Clorox, although not comparable with Procter's, were entirely adequate for its purpose and enabled it to continue its growth and to maintain and increase its share in the market. There has been no significant change in Clorox's market share in the four years subsequent to the merger.

Procter has eighteen hundred salesmen. Since the merger Procter has continued with Clorox distributors and has not used its own salesmen. Assuming that it may desire at some time to change over to salesmen, it is not probable that it could do so without substantially increasing the size of its sales force, which would involve additional expense. It is of course possible that some economies could be effected if a changeover is made, but that is no reason to condemn a merger otherwise lawful.

Clorox spent about ten per cent of its sales in advertising. Procter, in its soap and cleansing products business, is one of the nation's largest advertisers, spending about $70,000,000 in the year of the merger, and an additional $47,000,000 for promotion.

The Commission points out that Procter could obtain larger discounts than Clorox in television network, newspaper and magazine advertising, and could adapt the advertising on a national or local basis as the need arises. Clorox used principally spot announcements rather than network advertising, which were effective and very adequate for its own purpose. The cost of network advertising would seem to depend on the type of talent utilized on the program. TV stations, magazines and newspapers are not required to give discounts for quantity advertising and presumably could discontinue them at any time. Doubtless Procter could advertise more extensively than Clorox, but there is such a thing as saturating the market. We find it difficult to base a finding of illegality on discounts in advertising. Here again, in our judgment the fact that a merger may result in some economies is no reason to condemn it.[1]

The Commission urges that Procter, with its complete line of household products, is in a much better position than Clorox to obtain desirable shelf space in grocery stores, for the display of all of its products, including bleach. The evidence is clear that Clorox, prior to the merger, with distributors and not a sales force of its own, obtained very adequate shelf space, even in chain stores and supermarkets which displayed their own private brands. Where a product like Clorox has great consumer demand, a grocer is very likely to display it in order to satisfy his customers. We find no merit in this claim.

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[1] We cannot assume that Procter would divert the large sums which it found necessary to expend for advertising and promotion to maintain its competitive position in the soap and cleanser field to wipe out its competitors in the household bleach market.

The Commission directed attention to Procter's success in marketing new products. In 1957 Procter introduced a new abrasive cleanser called "Comet". At the time Procter entered the field, "Ajax", manufactured by Colgate-Palmolive, sold about fifty-six per cent of the total national sales of abrasive cleansers. Other leading brands were "Bab-O", which had twenty-four per cent of the total national sales, and "Blue Dutch", which had ten per cent. Over a period of twenty-two months Procter spent \$7.2 million in advertising and attained 36.5% of the national market; Ajax dropped to 36.9%, and all other brands, including Bab-O and Blue Dutch, fell from 44% to 26.6%.

If anything, this tends to show that Procter could have entered the liquid household bleach market on its own if it had desired to do so, and without having to defend the action of the Federal Trade Commission which followed its merger with Clorox. There is no evidence that it had any such intention. The share of the market it could have captured, whether it could have permanently retained it, and the cost, are matters of conjecture.

The Commission further points to an Erie County, Pennsylvania incident which took place after the merger, as evidence of the effectiveness of Procter's intensive advertising and promotion practices. Prior to the Erie incident, Clorox had about 52% of the market in that area, with "101", a brand sold by Gardner Mfg. Co., about 29% of that market. Purex, a competitor of Clorox, was not in the market. Purex decided to enter the Erie market. It introduced a new bottle and an alleged improvement in its bleach. It engaged in an intensive advertising and promotional campaign, offering reductions of ten and fifteen cents

on any size bottle and offering twenty and twenty-five cents reductions on half-gallon and gallon purchases. In about two months Purex captured 33% of the Erie market. Clorox dropped from 52% to 35%, and "101" brand dropped to 17%. Procter retaliated by offering its bleach at three cents off per quart, five cents off per half-gallon, and seven cents off one-gallon sizes. Subsequently it offered a one dollar value ironing board cover for fifty cents with each purchase of Clorox. Procter supplemented the regular newspaper advertising of Clorox with extensive TV spots. The market for Clorox was not only regained but its sales increased by 1% and Purex's share fell to 7%.

It was undisputed that Purex started this "price war". We think Procter was justified in retaliating to defend itself, to meet competition, and to prevent its business from being taken away. The incident revealed the power of Purex, which retreated after Procter adopted protective measures. It should be noted, however, that without the merger Clorox could, and in all probability would have resorted to the same measures and in all likelihood it would have obtained the same results. It had the know-how and the necessary finances to do so.

There was no evidence that Procter at any time in the past engaged in predatory practices, or that it intended to do so in the future. Ample authority exists for the Commission to deal with any such practices when the occasion arises. 15 U.S.C. § 13, Discrimination in prices—Underselling in particular localities; 15 U.S.C. § 14, Tying Agreements; 15 U.S.C. § 45, Unfair methods of competition.

The Commission urges that the merger eliminated a potential competitor, namely Procter. This issue was never raised until after all the evidence was in

and the appeal was taken to the second Commission. There was no evidence tending to prove that Procter ever intended to enter this field on its own. Its promotion department, in considering whether to enter into the proposed merger with Clorox recommended against Procter going into the bleach business on its own. The Commission's finding, therefore, is based on mere possibility and conjecture.

The merger in the present case was neither vertical nor horizontal, but conglomerate. The second Commission has characterized it as product extension. Since the 1950 amendments to Section 7, conglomerate as well as vertical and horizontal mergers come within the proscription of the Act. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

In a Section 7 case it is necessary to determine whether there is a reasonable probability that the merger may result in a substantial lessening of competition.

Amended Section 7 was intended to arrest anticompetitive tendencies in their incipiency. *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964); *United States* v. *Philadelphia Nat'l Bank, supra; Brown Shoe Co.* v. *United States, supra.* A mere possibility is not enough, *United States* v. *E. I. DuPont deNemours & Co.*, 353 U.S. 586 (1957); nor is certainty required, *United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

Prior to the merger Clorox was a well managed adequately financed company, steadily increasing its business and having nearly fifty per cent of the market. It had no competition on the national scale. Competition existed only in regional areas. Procter merely stepped into the shoes of Clorox. Whether or

not it can do better than Clorox in the liquid household bleach field, remains to be seen.

The Nielsen tables showing market share and point change on a unit and dollar basis, for a period of five years prior to the merger and four years after, do not reveal any significant change in the rate of growth of Clorox. Appendix "B".

Both tables showed a decline for Clorox in the year 1961. On the other hand, the total sales of liquid household bleach, other than Clorox, substantially increased both before and after the merger. Appendix "C".

It is obvious therefore that subsequent to the merger, competitors of Clorox sold substantially more bleach for more money than prior thereto. This evidence certainly does not prove anti-competitive effects of the merger. The Commission gave it no consideration.

We think the Commission was in error in ruling that post-merger evidence was admissible only in unusual cases and that it crept into the record needlessly in the present case, and in giving it no weight. This evidence was in the record, not needlessly, but because of the order of the first Commission.

The Commission relied on *F.T.C.* v. *Consolidated Foods*, 380 U.S. 592 (1965). The Supreme Court in that case did not hold that post-acquisition evidence was irrelevant and inadmissible. On the contrary it cited *United States* v. *E. I. DuPont deNemours & Co., supra,* as authority for considering such evidence. See also *Ekco Products Co.* v. *F.T.C.*, 347 F.2d 745 (7th Cir. 1965); *Reynolds Metals Co.* v. *F.T.C.*, 309 F.2d 223, 230 (D.C. Cir. 1962).[2] The Supreme

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[2] Reynolds involved a vertical merger where post-merger evidence offered by the Commission showed that five of

Court said that the post-acquisition evidence should not be given conclusive weight or allowed to override all probabilities. It held that the Court of Appeals in that case attached too much weight to it.

Any relevant evidence must be considered in a Section 7 case involving as it does the drastic remedy of divestiture. The extent to which inquiry may be made into post-merger conditions may well depend on the facts of the case, and where the evidence is obtained it should not be ignored. The weight to be attached to it depends upon all the facts and circumstances of the case.

It is contended that Procter's behavior subsequent to the merger may have been influenced by the pendency of the present proceeding. This is pure conjecture. As before pointed out, Procter was not in the habit of indulging in predatory practices, and if it engages in such practice in the future the Commission has ample power to deal with it.

The Commission and Procter rely on *Ekco Products Co.* v. *F.T.C., supra,* which cited the Commission's decision in the present case. *Ekco* involved two acquisitions, one of which was horizontal, and the other conglomerate. The facts were different in *Ekco* and the Court very carefully limited the decision to the facts of that case.

In considering the question of the substantiality of the evidence, we cannot ignore the two conflicting opinions of the Commission based upon the same evidence. Where an agency overturns findings of fact

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Arrow's seven competitors had by 1957 dropped from 14% to 47% below 1955 sales. If post-acquisition evidence is admissible to prove anticompetitive effects, it should also be admissible to establish that the merger resulted in no lessening of competition.

of a hearing examiner, this fact is considered by a reviewing court. *Universal Camera* v. *N.L.R.B.*, 340 U.S. 474, 496, 497 (1951); *N.L.R.B.* v. *Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943). Here the second Commission rejected the findings of the previous Commission. In our opinion, the same rule applicable to hearing examiners ought to be applied here.

As pointed out by the first Commission, the findings of illegality may not be based upon "treacherous conjecture", possibility, or suspicion. And yet this is exactly what the second Commission indulged in by basing many of its findings and conclusions upon hypotheses which the record shows have never taken place. An illustration of this is the finding that Procter was on the "brink" of entering the market on its own. Household liquid bleach is an old product; Procter is an old company. If Procter were on the brink it is surprising that it never lost its balance and fell in during the many years in which such bleach was on the market. It had never threatened to enter the market. *Cf. United States* v. *Penn-Olin Chem. Co.*, *supra*, at 173.

Other large corporations which were competitors of Procter, such as Lever Bros. and Colgate-Palmolive, had capabilities of entering the field. Monsanto Chemical and Diamond Alkali Co. had engaged in negotiations with Clorox. There are many other large companies in the country which had similar capabilities of entering into a conglomerate merger. There was no reasonable probability that Procter would have entered the household liquid bleach market but for the merger. *United States* v. *Penn-Olin Chem. Co.*, *supra*.

Clorox desired to sell its assets. Its owners were reaching the age of retirement and wanted to transform their stock into a marketable security of a successful company. A small company could not qualify.

Clorox either had to sell to a larger company or not sell at all.

The Commission recognized that complete guidelines for this type of merger have not yet been developed and that the case presented a challenge to it and to the courts "to devise tests more precisely adjusted to the special dangers to a competitive economy posed by the conglomerate merger." We do not believe these tests should involve application of a per se rule.

The Supreme Court has not ruled that bigness is unlawful, or that a large company may not merge with a smaller one in a different market field. Yet the size of Procter and its legitimate, successful operations in related fields pervades the entire opinion of the Commission, and seems to be the motivating factor which influenced the Commission to rule that the acquisition was illegal.

Here Procter was merely adding another product to its line, which was somewhat akin to the products which it was already handling. They were all household items sold in grocery stores. It could have entered the market on its own, but decided not to do so.

Considering the record as a whole, we are of the opinion that the decision of the second Commission is not supported by substantial evidence. *Universal Camera* v. *N.L.R.B., supra.*

We see no point in remanding this case to the Commission. This protracted litigation, which is going on to its ninth year, should come to a close.

The order of the Commission is set aside and the cause is remanded with instructions to dismiss the complaint.

APPENDIX A

MARKET SHARES OF LIQUID BLEACH BRANDS AS SHOWN BY THE NIELSEN FOOD INDEX FOR NINE TERRITORIES

Section of The Country	Clorox	Purex	Fleecy White	Hilex	Linco	Roman Cleanser	All Others
New England	56.0 [9]	— [10]	—	—	—	—	44.0
Metropolitan New York	64.3	—	—	—	—	—	35.7
Middle Atlantic	71.6	—	—	—	—	—	28.4
East Central	42.4	5.0	5.2	0.9	0.7	27.2	18.6
Metropolitan Chicago	28.6	0.1	18.9	0.1	50.3	—	2.0
West Central	34.5	20.6	9.0	25.8	2.1	—	8.0
Southeast	52.6	16.0	5.7	—	—	5.3	20.4
Southwest	48.4	39.6	3.9	—	—	—	8.1
Pacific	39.2	42.4	—	—	—	—	18.4

Source: 154X. The section of the country included in each of the Nielsen territories is shown on page 70 of CX 325 (certified to the Court, but not printed). The accuracy of the Nielsen data was stipulated (820a-21a).

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[9] Percent of total sales of liquid bleach on a consumer dollar basis.

[10] No figure given if the brand listed is not sold in the area.

Appendix B

TOTAL UNITED STATES

Nielsen—Liquid Household Bleaches

Summary of Clorox Share Changes

32 oz. Equivalent Unit Basis:

Year Ended	Share	Point Change
August 1, 1953	41.4	—
August 1, 1954	43.0	+1.6
August 1, 1955	44.0	+1.0
August 1, 1956	44.8	+0.8
August 1, 1957	45.3	+0.5
	Total Change	+3.9
	Average Annual Change	+0.975
August 1, 1958	45.8	+0.5
August 1, 1959	46.8	+1.0
August 1, 1960	48.8	+2.0
August 1, 1961	48.6	−0.2
	Total Change	+3.3
	Average Annual Change	+0.825

Dollar Basis at Cost Price to Consumer:

Year Ended	Share	Point Change
August 1, 1953	45.3	—
August 1, 1954	46.4	+1.1
August 1, 1955	47.1	+0.7
August 1, 1956	47.8	+0.7
August 1, 1957	48.4	+0.6
	Total Change	+3.1
	Average Annual Change	+0.775
August 1, 1958	48.7	+0.3
August 1, 1959	50.1	+1.4
August 1, 1960	51.8	+1.7
August 1, 1961	51.9	+0.1
	Total Change	+3.5
	Average Annual Change	+0.875

Appendix C

TOTAL UNITED STATES

Nielsen—Liquid Household Bleaches

SALES OF ALL LIQUID HOUSEHOLD BLEACHES—OTHER THAN CLOROX

Prior to Acquisition

Year Ended	32 ounce Equivalent Units	Consumer Dollars
August 1, 1953	270,011,000	$39,178,000
August 1, 1954	273,046,000	40,230,000
August 1, 1955	290,092,000	43,443,000
August 1, 1956	308,797,000	46,638,000
August 1, 1957	319,734,000	49,478,000

Subsequent to Acquisition

Year Ended	32 ounce Equivalent Units	Consumer Dollars
August 1, 1958	329,656,000	$53,910,000
August 1, 1959	345,726,000	56,287,000
August 1, 1960	346,038,000	56,197,000
August 1, 1961	365,354,000	59,254,000

APPENDIX B

No. 15,769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE PROCTER & GAMBLE COMPANY, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

ORDER

BEFORE: WEICK, Chief Judge, PHILLIPS, Circuit Judge, and GREEN, District Judge.

On Petition for Review of an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Federal Trade Commission be set aside and the cause remanded with instructions to dismiss the complaint.

No costs awarded. Rule 23(4).

Entered by order of the Court.
/s/ Carl W, Reuss
Clerk

Issued as Mandate: April 14, 1966

COSTS: NONE

Filing fee ....$..................

Printing appendix ....$..................

Total $..................

A True Copy.

ATTEST:

/s/ Carl W. Reuss
CARL W. REUSS, Clerk

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 6901

In the Matter of

THE PROCTER & GAMBLE COMPANY, a corporation.

FINAL ORDER

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner filed on February 28, 1962. The Commission has rendered its decision, denying the appeal in all respects, and adopting the findings of fact and conclusions of law made by the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

IT IS ORDERED that:

I.

Respondent, The Procter & Gamble Company, a corporation, and its offices, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, shall divest, absolutely and in good faith, all assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and good will, acquired by The Procter & Gamble Company as a result of the acquisition by The Procter & Gamble Company of the assets of Clorox Chemical Company, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Clorox Chemical Company since the acquisition.

II.

By such divestiture, none of the assets, properties, rights or privileges, described in paragraph I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of The Procter & Gamble Company, or to any purchaser who is not approved in advance by the Federal Trade Commission.

III.

If respondent divests the assets, properties, rights and privileges, described in paragraph I of this order,

to a new corporation or corporations, the stock of each of which is wholly owned by The Procter & Gamble Company, and if respondent then distributes all of the stock in said corporation or corporations to the stockholders of The Procter & Gamble Company, in proportion to their holdings of The Procter & Gamble Company stock, then paragraph II of this order shall be inapplicable, and the following paragraphs IV and V shall take force and effect in its stead.

IV.

No person who is an officer, director or executive employee of The Procter & Gamble Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of The Procter & Gamble Company, shall be an officer, director or executive employee of any new corporation or corporations described in paragraph III, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation or corporations described in paragraph III.

V.

Any person who must sell or dispose of a stock interest in The Procter & Gamble Company or the new corporation or corporations, described in paragraph III, in order to comply with paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of The Procter & Gamble Company.

VI.

No method, plan or agreement of divestiture to comply with this order shall be adopted or imple-

mented by respondent save upon such terms and conditions as shall first be approved by the Federal Trade Commission.

VII.

As used in this order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

VIII.

Respondent shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

By the Commission, Commissioner Anderson concurring in the result.

SEAL

/s/ Joseph W. Shea
JOSEPH W. SHEA,
Secretary.

ISSUED: November 26, 1963

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 6901

In the Matter of

THE PROCTER & GAMBLE COMPANY, a corporation.

OPINION OF THE COMMISSION

By Commissioner Elman:

The Commission's complaint, issued on September 30, 1957, charged that respondent's acquisition on August 1, 1957, of all the assets of Clorox Chemical Company violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). After extended hearings, the hearing examiner rendered an initial decision in which he found the acquisition unlawful and ordered divestiture. On appeal, the Commission, concluding "that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition . . . on competition", and hence that the record "should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits", ordered on June 15, 1961, that the initial decision be vacated, that the case be remanded to the hearing

examiner for the reception of additional evidence, and "that after receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein."

On remand, additional evidence was introduced, and the hearing examiner rendered a second initial decision in which he again found the acquisition unlawful and ordered divestiture. In the course of oral argument on July 11, 1962, before the Commission on appeal from this decision, a question was raised whether the Commission was free to decide the case on the basis of the entire record, or whether it must assume that the record on the first appeal did not support a finding of illegality and confine its attention to the additional evidence introduced on remand. The Commission, believing that the public interest required that the case be decided on the entire record, directed reargument of all contested issues of fact and law (order of November 30, 1962). Reargument was held on January 30, 1963. The case is now ready for final decision on the entire record.

I. "*Law of the Case*"

We meet at the threshold the contention that notwithstanding the Commission's order of reargument, in which its intention to consider the issues of this case on the entire record was clearly announced, such a course is barred by the principle of "law of the case". The principle, that an appellate tribunal will not reconsider its own rulings of law on a subsequent appeal in the same case, is not, we think, applicable here.

The language of the Commission's order of remand, quoted above, should dispel any inference that a ruling on the sufficiency of the evidence to support the complaint was intended. The basis of the order, in

fact, was that the record was inadequate for the making of any ruling, and hence required supplementation; decision of all the issues of the case was expressly postponed by the Commission pending receipt of the additional evidence; and the hearing examiner was directed to file a new initial decision on the basis of the entire record.

It is true that in its opinion accompanying the order of remand, the Commission expressed the view that the post-acquisition data on which the hearing examiner had relied heavily in his first initial decision did not support the examiner's finding of illegality. However, even if this tentative expression of opinion be deemed a ruling of law, plainly it affected only a single, narrow aspect of the case. Inasmuch as the post-acquisition evidence introduced in this case is not a material factor in our decision (see pp. [123-124] below), whatever ruling the Commission may earlier have made as to the relevance or sufficiency of such evidence to support a finding of illegality is, at this point, moot.

In any event, the doctrine of law of the case is not an inexorable command, but "only a discretionary rule of practice." *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199; see Note, 65 Harv. L. Rev. 818, 822 (1952). Every consideration of fairness and of the public interest weighs in favor of our now deciding this case on the entire record. For one thing, only one of the present members of the Commission (Commissioner Anderson) participated in the decision of the first appeal. It would be a forced and unnatural exercise for us to consider the evidence introduced on remand in isolation from the rest of the record or attempt to divine how our predecessors would have reacted to that additional evidence. If we are to decide this case fairly

and rationally, we must be free to draw our own inferences from the entire record.

In addition, it is a widely recognized basis for relaxing application of the doctrine of law of the case that the law has changed in the interim. Note, *supra*, at 822, n. 15. The expressions of opinion accompanying the order of remand were based on the view that post-acquisition evidence is crucial in a case of this sort—a view which has been undermined, if not rejected, by two supervening decisions of the Supreme Court (see discussion at pp. [83-89] below). Accordingly, we feel free to consider the issues of this case unfettered by the observations made in the earlier opinion.

Nor can respondent argue that it has been unfairly surprised by being compelled to argue the case on the entire record. It was to eliminate any such possibility of unfairness that the Commission ordered reargument and gave the parties full opportunity to brief and argue the case on the entire record.

The consequence of the Commission's order of remand has been a regrettable delay in the final disposition of an already protracted litigation. However, delays of this kind are perhaps inevitable where, as here, difficult questions of law are presented which the courts have not authoritatively resolved. In any event, the remedy for such delays is not decision of the case in a truncated posture, but clarification of the issues through reasoned decision on the entire record.

II. *The Facts and Background*

The complaint alleges that the effect of the acquisition by respondent, The Procter & Gamble Company (Procter), of the assets of Clorox Chemical Company (Clorox), "may be substantially to lessen competition,

or to tend to create a monopoly", in the manufacture of household liquid bleach throughout the nation.

Household liquid bleach is a 5¼% sodium hypochlorite solution which is used in the home as a germicide and disinfectant and, more importantly, as a whitener in the washing of clothes and fabrics. To a certain extent, the use of household liquid bleach overlaps that of other products, especially powdered bleach; also, liquid bleach in somewhat stronger solution has industrial uses. Nevertheless, the parties appear to agree that household liquid bleach is a distinctive product, recognized as such by the consumer and by the trade, and that it has no close substitutes (see p. [89] below).

At the time of the acquisition, Clorox was the nation's leading manufacturer of household liquid bleach. Its annual sales of slightly less than $40,000,000 represented almost 50% of the national total,[1]

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[1] Complaint counsel and respondent's counsel have stipulated the accuracy of the A. C. Nielsen Food Index, a compendium of statistics on the sales volume of various grocery products. The Index gives the following picture of household liquid bleach sales in 1957:

Market Shares of Household Liquid Bleach Manufacturers
(consumer dollar basis)

Brand	Percentage of Total U.S. Sales
Clorox	48.8
Purex	15.7
Roman Cleanser	5.9
Fleecy White	4.0
Hilex	3.3
Linco	2.1
Total	79.8
All Other Brands	20.2

and its market share had been growing steadily for at least five years prior to the acquisition.

As the table in note 1 shows, Clorox's principal competitor is the Purex Corporation. Unlike Clorox, which is engaged almost exclusively in the manufacture of household liquid bleach, Purex manufactures a number of products, including an abrasive cleanser (Old Dutch Cleanser), a toilet soap (Sweetheart), and detergents (Trend and News). Total sales of all its products were approximately $50,000,000 in 1957.

The table shows that in 1957 Clorox and Purex between them accounted for almost 65% of the nation's household liquid bleach sales, and, together with four other manufacturers, for almost 80%. The remaining 20% was divided among 132 listed (in Dun & Bradsteet), and a number of unlisted (roughly 91), small producers. (These figures may be somewhat overstated.) In addition, there seems to be a large number of extremely small, so-called "garage" or "down-cellar" bleach producers. Only eight manufacturers of liquid bleach have assets of more than $1,000,000; very few, in fact, have assets of more than $75,000.

Most manufacturers of household liquid bleach sell at least part of their production to grocery stores and supermarkets for resale to the consumer under the stores' own brand name. These private or house brands, however, appear to account for only a small proportion of the total sales of liquid bleach.[2] Clorox

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[2] In the Nielsen Index, the private brand production of all manufacturers is included in the 20.2% residual category. The Safeway supermarket chain is evidently the only retailer of household liquid bleach that actually manufactures its private brand.

sells no private brand liquid bleach—all of Clorox's bleach is sold under the "Clorox" brand name—and Purex very little.

The equipment, raw materials and labor required in the manufacture of liquid bleach are relatively inexpensive, and neither the product nor its process is the subject of a patent or trade secret. However, owing to its weight, to its low sales price per unit, and to the fact that it is ordinarily sold in bottles, household liquid bleach is expensive to ship. Freight, which the manufacturer pays for—the liquid bleach industry uniformly sells on a delivered-price basis—, commonly averages more than 10% of unit cost. For this reason, household liquid bleach cannot profitably be distributed outside a radius of perhaps 300 miles from the point of manufacture. Most manufacturers, since they have only a single plant, are limited to a regional market. Indeed, Clorox, which has 13 plants distributed throughout the country, is the only producer selling on a national scale. Although Purex has as many plants as Clorox, it does not distribute its bleach in the northeast or middle-Atlantic states. In 1957, Purex bleach was available in less than 50% of the national market. The other manufacturers of liquid bleach are still more limited territorially.[3]

As a result of the territorial limitations of Clorox's competitors, the percentage figures in the table in note 1 do not give an adequate picture of Clorox's position in the various regions of the country. For example, Clorox's seven principal competitors did no

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[3] For example, 60% of the sales of Linco, the sixth-largest-selling liquid bleach brand (see note 1, *supra*), are made in metropolitan Chicago. There was evidence that some liquid bleach brands are marketed only in the Italian neighborhoods of New York City.

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business in New England, metropolitan New York or the middle-Atlantic states, and Clorox's share of the liquid bleach sales in these areas was 56%, 64%, and 72%, respectively. Even in areas where the principal competitors of Clorox were active, Clorox's share of total liquid bleach sales was high. Except in metropolitan Chicago and the west-central states, Clorox accounted for at least 39%, and often for a much higher percentage, of liquid bleach sales in the various regions.

It is not immediately apparent how Clorox was able to obtain a leading position in the household liquid bleach industry. Clorox is not sold to the consumer at a lower price than other bleaches; on the contrary, it is a premium brand that commonly sells for several cents per quart more than regional, local or private brands. Nor is Clorox a better bleach than other brands; all household liquid bleaches are chemically identical. Nor is the industry plagued by inadequate productive capacity or shortages; none of Clorox's competitors is producing at full capacity, and, as was mentioned earlier, the manufacturing process is relatively simple and inexpensive.

The explanation seems to lie in the way in which household liquid bleach is marketed. It is a low-price, high-turnover consumer product sold mainly to housewives in grocery stores. As a consequence of the growth of the self-service grocery store or supermarket, the consumer is no longer dependent upon the storekeeper's advice in purchasing commonly used, inexpensive household items such as liquid bleach. The housewife purchases the brand that she sees displayed prominently on the shelf or that is familiar and attractive to her by reason of advertising or sales promotions. Since the amount of shelf space that the

grocer gives a particular brand is largely a function of the sales volume of the brand, it is apparent that the success of a particular brand of liquid bleach depends upon the manufacturer's successfully pre-selling it, whether by means of attractive packaging, a low price, advertising and sales promotion efforts, or otherwise. Cf. *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 893 (S.D.N.Y. 1963).

Prior to its acquisition by Procter, Clorox had not been active in "sales promotions", a term which embraces such selling devices or gimmicks as price-off labels, two-for-one offers, coupons, free samples, premiums and contests. But it had advertised extensively. In 1957, for example, Clorox spent $1,750,000 for newspaper advertising, $560,000 for magazine advertising, $258,000 for radio and billboard advertising, and $1,150,000 for television advertising. Advertising expenditures, thus, were equal to almost 10% of total sales.

As a result of Clorox's long-continued mass advertising, its trade name had become widely known to and preferred by the consumer notwithstanding its high price and lack of superior quality. Most manufacturers of liquid bleach lack the financial resources to advertise or promote extensively. Purex, it is true, is a large advertiser, but its advertising—and *a fortiori* that of Clorox's lesser competitors—is very possibly less effective than Clorox's because of Purex's territorially limited distribution. It is apparent that the effectiveness of advertising in media of mass circulation normally is enhanced if the product is sold nationally. See, e.g., Bain, *Advantages of the Large Firm; Production, Distribution, and Sales Promotion*, 20 J. of Marketing 336, 340, 344 (1956). Obviously, it is relatively inefficient to pay for national advertising coverage, e.g., in national magazines or network

television, without having national distribution of the advertised product. In general, moreover, it is rarely possible to adjust the dissemination of an advertising message to the precise bounds of the territory in which the advertised product is distributed. In addition, in a nation such as ours, which has a very mobile population, a brand obtainable by the consumer in every part of the country is likely to be better known than and preferred to a product marketed only regionally or locally.

The allegiance to a particular brand that is created by mass advertising and promotion tends, in the case of low-cost, high-turnover household products, to be somewhat ephemeral; the housewife is easily lured from her accustomed brand by promotional and advertising efforts on the part of rival manufacturers. The record in this case contains a graphic illustration of the volatile quality of consumer brand preferences. In Erie, Pennsylvania, Purex launched a major "attack" on Clorox's theretofore entrenched position (Clorox enjoyed more than 50% of the sales in the area) by marketing Purex liquid bleach in a new container and by promoting the "improved" product intensively by means of price-off labels and coupons. Within a few weeks, Purex, which previously had done no business in the area, had won a market share of more than 30%. Clorox immediately counter-attacked, however, and, by means of strenuous promotional efforts (consisting of price-off and premium offers), coupled with intensive advertising, soon forced Purex's share down to 7%.

At the time of its acquisition of Clorox, Procter was one of the nation's 50 largest manufacturers, with total net sales in 1957 of $1,156,000,000. Procter manufacturers a wide range of low-priced, high-

turnover household consumer items sold through grocery, drug and department stores,[4] but prior to the acquisition of Clorox, it did not produce household liquid bleach. Procter's major locus of activity is in the general area of soaps, detergents and cleansers.[5] In 1957, of total domestic sales, more than one half ($514,000,000) were in this field. In packaged de-

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[4] In the answer to the complaint, respondent offered the following "list of the most important brands sold by respondent": *"Soaps, Detergents and Cleansers:* Ivory Soap—all-purpose bar soap; Ivory Flakes—mild all-purpose flake soap; Ivory Snow—mild all-purpose granulated soap; Camay—hard-milled perfumed toilet soap; Lava—pumice hand soap; Duz—detergent and granulated soap; Tide—heavy-duty detergent; Cheer—heavy-duty detergent; Dreft—light-duty detergent; Oxydol—heavy-duty detergent; Dash—low sudsing heavy-duty detergent; Joy—liquid general purpose detergent; Comet—scouring cleanser; Cascade—detergent for automatic dishwashers; Spic and Span—paint and linoleum cleaner; Zest—detergent toilet bar; *Food Products:* Crisco—vegetable shortening; Golden Fluffo—vegetable and lard shortening; Big Top—peanut butter and peanuts; Duncan Hines—prepared baking mixes—15 kinds; *Toilet Goods:* Crest—fluoridated toothpaste; Gleem—toothpaste; Drene—liquid shampoo; Prell—paste and liquid shampoo; Shasta—cream shampoo; Lilt—home permanent; Pin-It—home permanent; *Paper Products:* Charmin—household toilet tissue; Lady Charmin—household toilet tissue; Charmin—facial tissue; Charmin—paper napkins; Charmin—paper towels; Evergreen—industrial paper towels and tissue. On a consumer dollar basis, Procter in 1957 had 31% of the nation's total sales of toilet soap; 32%, dentifrices; 30%, lard and shortening combined; 19%, shampoo; and see p. [58] below.

[5] Soaps, detergents and cleansers, we shall call, for the sake of simplicity, "household cleansing agents". The term is meant to exclude mops, waxes, polishes, brooms and other such relatively high-priced, specialty items used in household cleaning.

tergents alone,[6] Procter's sales were $414,000,000, and this was 54.5% of the national total. In the household cleansing agents industry, Procter's principal competitors are Colgate-Palmolive and Lever Brothers. Together, these three firms account for more than 80% of total sales. Procter is the leading firm of the three. In 1957, total sales of Colgate-Palmolive and Lever Brothers were $291,000,000 and $250,000,000, respectively. There are no other firms in the industry of comparable size. Purex was the next largest after the "Big Three", with sales, as was noted earlier, of about $50,000,000 in 1957, followed by B. T. Babbitt, Inc., with sales of less than $22,000,000.

In the marketing of soaps, detergents and cleansers, as in the marketing of household liquid bleach, extensive advertising and sales promotion seem to be the key to success. Procter is one of the nation's leading advertisers. In 1957, it spent upwards of $80,000,000 on advertising (principally television advertising) in the United States, and was, in fact, the nation's largest advertiser in that year. In addition, it spent $47,000,000 for domestic sales promotions alone. (Procter's total domestic sales in 1957 were approximately $900,000,000.) Colgate-Palmolive and Lever Brothers, Procter's principal competitors, also rank high among the nation's largest advertisers.

The record in this case contains a striking example of the role of advertising and promotion in the household cleansing agents industry. In 1957, Procter introduced a new abrasive cleanser, which it called "Comet". Over a 22-month period, Procter spent $7,-

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[6] The term "packaged detergents" embraces heavy-duty high-sudser detergents, heavy-duty low-sudser detergents, heavy-duty soaps, heavy-duty liquids, light-duty synthetics, light-duty liquids, and light-duty soaps.

200,000 for the advertising and sales promotion of Comet; 20 months after it first appeared on the market, Comet had attained 36.5% of the national market in abrasive cleansers. (The abrasive cleansers industry had total sales of $53,000,000 in 1957—somewhat more than one-half the total sales of household liquid bleach in that year.) It would appear that Comet's success is traceable mainly to the intensive advertising and promotional efforts made on its behalf. (See generally *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963); Klaw, "The Soap Wars: A Strategic Analysis", *Fortune*, June 1963, p. 122.)

Procter's acquisition of Clorox was the culmination of two years of study of the liquid bleach industry undertaken by its promotion department in order to determine the advisability of Procter's entering the industry. The first report from the promotion department observed that liquid bleach accounted for 90% of the large and expanding household bleach market and predicted that its ascendancy over powdered bleach would continue in the foreseeable future. The report, however, recommended not that Procter attempt to market its own brand of bleach, as it had repeatedly and successfully done with other household products, but rather that it purchase Clorox. Since, the report advised, "a very heavy investment" would be required for Procter to obtain a satisfactory market share for a new brand of liquid bleach, entry into the industry through acquisition of its leading firm was an attractive alternative. "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly, which would pay out reasonably well." The report predicted that Procter's "sales, distributing and manufacturing setup" could increase Clorox's share of

the market in certain areas where it was low and effect a number of savings that would increase the profits of the business considerably.

A subsequent report from the promotion department confirmed the earlier recommendation, emphasizing that Procter management would be able to make more effective use of Clorox's advertising budget and that the merger would enable advertising economies.

A few months after the second report was filed, Procter acquired the assets of Clorox in the name of a wholly owned Procter subsidiary, The Clorox Company, in exchange for stock of Procter having a market value of approximately $30,300,000.[7] At the time of the exchange, Clorox's assets were valued at $12,600,000.

Since the acquisition, the top management of Clorox has been placed in the hands of Procter officials, and some degree of integration of Clorox and Procter activities has taken place (see p. [125] below). By and large, however, Clorox has been operated as a separate entity within the Procter organization.

III. *The Legality of the Merger Under Section 7*

A. Categories of Mergers

The hearing examiner, respondent, and complaint counsel concur in describing the merger of Clorox and Procter as "conglomerate". This term, far from denoting a homogeneous class of mergers, tells us only

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[7] The Procter shares received in the exchange were distributed to Clorox's shareholders, whereupon Clorox Chemical Company was dissolved. We shall refer loosely to the entire transaction as the merger of Clorox and Procter or the acquisition of Clorox by Procter.

that the instant merger is neither conventionally "horizontal" nor conventionally "vertical". An analysis of each of these terms is necessary before we proceed further in the discussion of this case.

A horizontal merger, as ordinarily understood, is one between firms that make or sell the same product, or products which are close substitutes for each other. However, unless the firms actually operate within the same geographical market, the merger will have no immediate impact upon the market share of the acquiring firm—the hallmark of a conventional horizontal merger. Where the merger involves companies selling in different geographical markets (or, what may amount to the same thing, to different customer classes, cf. *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided July 31, 1963)), we have what has been termed a market-extension merger. See *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962). It may be a merger in which the acquired firm sells the same product as the acquiring firm and is a prospective entrant into the geographical market occupied by the acquiring firm. See *United States* v. *El Paso Natural Gas Co.*, 1962 CCH Trade Cases ¶ 70571 (D. Utah), prob. juris. noted, 373 U.S. 930; *Foremost Dairies, Inc., supra,* pp. 48-49. Or the acquiring firm may be a prospective entrant into the market of the acquired firm. *Foremost Dairies, Inc., supra,* pp. 49-50.

Another variant of the conventional horizontal merger is the merger of sellers of functionally closely related products which are not, however, close substitutes. This may be called a product-extension merger. The expression "functionally closely related", as used here, is not meant to carry any very precise connotation, but only to suggest the kind of merger that may enable significant integration in the production, distribution or marketing activities of the

merging firms. As example of a merger enabling integration at the production level would be the merger of a liquid bleach with a liquid starch manufacturer; the manufacturing processes involve many of the same raw materials and equipment. Integration at the level of physical distribution might occur in the case of products which, for example, are shipped together. Integration at the marketing level (including integration of advertising and sales-promotion activities) might result where products manufactured by the merging firms are sold to the same customers or through the same outlets, or are actually complementary.[8]

A vertical merger, conventionally understood, is one between firms at different points on the same chain of distribution, that is, firms which actually or potentially are in the relationship of supplier and customer. Rather similar effects on competition, however, may result from a merger involving the acquisition not of a supplier but of a supplier's supplier.[9]

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[8] See Hale, *Diversification: Impact of Monopoly Policy Upon Multi-Product Firms,* 98 U. Pa. L. Rev. 320, 331-32 (1950). A complementary relationship between products exist "when a rise in the consumption or purchases of one cause a rise in the demand for the other . . . ." Boulding, Economic Analysis 226 (3d ed. 1955). See *United States* v. *Winslow,* 227 U.S. 202. See generally Bowman, *Tying Arrangements and the Leverage Problem,* 67 Yale L. J. 19 (1957). It has been suggested that a multi-product firm's activities be termed "divergent" when integration is enabled at the production level and the products are sold in different markets, and "convergent" when the products, though made through different processes, are sold through the same channels, by the same marketing techniques, or to the same customers. Thorp & Crowder, The Structure of Industry 146 (T.N.E.C. Monograph No. 27, 1941).

[9] See *Consolidated Foods Corp.,* F.T.C. Docket 7000 (decided November 15, 1962). Cf. Bigness and Concentration of

And effects akin to the "reciprocity" which such a merger fosters may flow from any merger involving firms that deal in common with other firms. Thus, the merger of two firms having common marketing outlets might facilitate tie-in or full-line forcing agreements.

Only when the various subcategories of horizontal and vertical mergers have been exhausted (and the foregoing discussion of such subcategories is intended to be suggestive only) do we reach the true diversification or conglomerate merger, involving firms which deal in unrelated products. Cf. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949). An extreme example might be the purchase of a newspaper kiosk in New York by a bakery in California.

The merger of Clorox and Procter may most appropriately be described as a product-extension merger. Packaged detergents—Procter's most important product category—and household liquid bleach are used complementarily, not only in the washing of clothes and fabrics, but also in general household cleaning, since liquid bleach is a germicide and disinfectant as well as a whitener. From the consumer's viewpoint, then, packaged detergents and liquid bleach are closely related products. But the area of relatedness between products of Procter and of Clorox is wider. Household cleansing agents in general, like household liquid bleach, are low-cost, high-turnover household consumer goods marketed chiefly through grocery stores and pre-sold to the consumer by the manufacturer through mass advertising and sales promotions. Since products of both parties to the

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Economic Power—A Case Study of General Motors Corporation, Staff Rep. of the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 84th Cong., 2d Sess. 41 (1956).

merger are sold to the same customers, at the same stores, and by the same merchandising methods, the possibility arises of significant integration at both the marketing and distribution levels.

The functional relationship between household liquid bleach and products manufactured by Procter appears to hold even if we look beyond household cleansing agents to the food, paper and toilet products which round out the Procter line. They also are low-cost, high-turnover household consumer goods which are sold largely, although not entirely, through grocery stores and are heavily advertised and promoted.

By this acquisition, then, Procter has not diversified its interests in the sense of expanding into a substantially different, unfamiliar market or industry. Rather, it has entered a market which adjoins, as it were, those markets in which it is already established, and which is virtually indistinguishable from them insofar as the problems and techniques of marketing the product to the ultimate consumer are concerned. As a high official of Procter put it, commenting on the acquisition of Clorox, "While this is a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, we are thoroughly at home in the field of manufacturing and marketing low priced, rapid turn-over consumer products."

B. General Principles in the Interpretation and Application of Section 7

The lawfulness, under Section 7 of the Clayton Act, as amended, of the kind of merger involved in the instant case, is a question largely of first impression. In general, the conglomerate merger (in the broad sense of that term) has received little attention under

the antitrust laws.[10] Its history of neglect appears to be due, first, to the erroneous view that Section 7 in its original form applied only to horizontal mergers[11]—a view which stultified enforcement of the antitrust laws against conglomerate mergers until the amendment of Section 7 in 1950—and, secondly, to economists' preoccupation with the number and size distribution of firms in a single market.[12] But at the same time that the conglomerate merger was being ignored by lawyers and economists, businessmen were resorting to it increasingly as a mode of corporate expansion. Today, many, perhaps most, mergers involving substantial firms are conglomerate, and concern has begun to be voiced.[13]

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[10] The problems of conglomerate power occasionally arise, however, in the context of other provisions of the antitrust laws. See *United States* v. *Griffith,* 334 U.S. 100; *United States* v. *Swift & Co.,* 286 U.S. 106; *United States* v. *Swift & Co.,* 189 F. Supp. 885 (N.D. Ill. 1960); *Alexander Milburn Co.* v. *Union Carbide & Carbon Corp.,* 15 F.2d 678 (4th Cir. 1926); cf. *United States* v. *E.I. duPont de Nemours & Co.,* 188 Fed. 127 (Cir. Ct. D. Del. 1911).

[11] This view was ultimately rejected by the Supreme Court in *United States* v. *E. I. duPont de Nemours & Co.,* 353 U.S. 586. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 313, n. 21.

[12] See, e.g., such assertions as, "The fact is that a truly conglomerate merger cannot be attacked in order to maintain competition, because it has no effect on market structure." Adelman, *The Antimerger Act, 1950-60,* 51 Am. Econ. Rev., 236, 243 (Papers and Proceedings, 1961). Cf. *United States* v. *Winslow,* 227 U.S. 202, 217. For a path-finding study of the problems of the conglomerate merger under the amended Section 7, see Neal, *The Clayton Act and the Transamerica Case,* 5 Stan. L. Rev. 179 (1953).

[13] "In a word then, we find that the antitrust laws have failed to stem the horizontal and vertical merger movements

The absence of authoritative, specific precedents in this area compels us to look to basic principles in the interpretation and application of Section 7. The Commission and the federal courts have now had the benefit of more than a decade of enforcement of the amended Section 7, and the numerous decisions construing the statute include two by the Supreme Court. To the principles which have emerged, we turn for guidance in the instant case.

First. All mergers are within the reach of the amended Section 7, whether they be classified as horizontal, vertical or conglomerate, and all are to be tested by the same standard. This is plain not only from the statutory language, but from the legislative

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of the 1890's and the 1920's, and have had no deterrent effect on the conglomerate merger movement of the 1950's and 1960's." Houghton, *Mergers, Superconcentration, and the Public Interest,* in Administered Prices: A Compendium on Public Policy 152, 158 (Comm. Print 1963). See Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy,* in *id.*, at 109-10, 130; Federal Trade Commission, Report on Corporate Mergers and Acquisitions 50-51, 54 (1955); Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, Staff Rep. of the H. Select Comm. on Small Business, 87th Cong., p. 44 (Comm. Print 1962). A suggestive statistic in this connection is that between 1947 and 1958, the 50 largest manufacturing firms in the nation increased their share of total value added by manufacture from 17% to 23%; the top 100, from 23% to 30%; the top 150, from 27% to 35%; and the top 200, from 30% to 38%. Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, *op. cit. supra,* at 13. See also Collins & Preston, *The Size Structure of the Largest Industrial Firms, 1909-58,* 51 Am. Econ. Rev. 989 (1961). One economist has suggested that the increasing concentration of the nation's industrial assets in the hands of large firms is attributable to the conglomerate-merger movement. Houghton, *supra,* at 154-55.

history as well: "[T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly." [14] The inclusion of conglomerate mergers within the scope of the statute cannot be dismissed as casual or inadvertent. This Commission's Report on the Merger Movement (1948), which played an important role in the deliberations leading to the amendment of Section 7, had emphasized the dangers presented by conglomerate mergers: "[T]here are few greater dangers to small business than the continued growth of the conglomerate corporation." *Id.*, at 59. Congress' clearly expressed concern with the conglomerate merger is in striking contrast to the preoccupation of lawyers and economists with tests that look only to the number and size distribution of firms in a single market, and is a challenge to this Commission and to the courts to devise tests more precisely adjusted to the special dangers to a competitive economy posed by the conglomerate merger.[15]

It must be stressed, however, that Congress, in seeking to bring "conglomerate" mergers within the reach of Section 7, did not thereby express the view that conglomerates are analytically a distinct merger class. Congress meant only that however a merger be characterized, its legal status under Section 7 is the

[14] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949); see *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317.

[15] "Section 7 should be able to check a merger producing or enhancing the power of a giant firm without reference to the effect on concentration ratios in any particular market." Dirlam, *supra*, note 13, at 105. See Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 Antitrust Bull. 175, 178 (1956).

same. As we have seen, even for purposes purely of description, the traditional threefold classification —horizontal, vertical and conglomerate—is unsatisfactory without considerable further refinement. More important, these definitional distinctions import no legal distinctions under Section 7. The legal test of every merger, of whatever kind, is whether its effect may be substantially to lessen competition, or tend to create a monopoly, in any line of commerce in any section of the country.

Second. The Supreme Court has recently declared "Subject to narrow qualifications, it is surely the case that competition is our fundamental national policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 372. This policy informs all the federal antitrust laws, but some more explicitly than others. Section 7 predicates illegality specifically on the probability of a substantial anti-competitive effect; like the other sections of the Clayton Act, it singles out a particular class of business practices—corporate acquisitions—for especially strict antitrust scrutiny by the courts and the Commission. If the adverse effects on competition specified in Section 7 are proved, it will normally not be open to the respondent to show that redeeming social or economic benefits will flow from the acquisition.[16] In the words of the Supreme Court:

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[16] The single exception is the failing-company defense (see *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291, 299-303), which, although not mentioned in the statute, seems plainly to have been intended by Congress to be carried forward in the enforcement of the amended Section 7. See H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). No contention has been

"We are clear . . . that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." *Philadelphia National Bank, supra,* at 371.

While a broad Rule of Reason may not be read into Section 7, it is clear that mergers are not to be judged according to a so-called *per se* standard. In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probable anti-competitive effect. Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se* unlawful. In every case the determination of illegality, if made, must rest upon specific facts. There may be cases in which a relatively simple test of illegality is appropriate, as the Supreme Court has shown in the *Philadelphia National Bank* case, but this is possible only where consideration of the nature and circumstances

made in this case that Clorox at the time of the acquisition was other than a profitable, healthy concern.

of the merger in question indicates that such a test will provide an adequate basis for ascertaining whether the statute has been violated; and even in such cases no *per se* rule or conclusive presumption of illegality is applied.[17]

Third. The concept of competition which underlies the amended Section 7 has no simple or obvious meaning, and was defined by Congress neither in the statute itself nor in the course of the deliberations that led to its enactment. But some of its elements, at least, are clear. It has been observed by the Supreme Court that the "dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."[18] Congress' emphasis on concentration reflected its deep concern with what economists would call the problem of oligopoly (see S. Rep. No. 1775, 81st Cong., 2nd Sess. 5 (1950))—a problem that centers on undue or excessive market concentration. Indeed, the relationship between concentration (and related market-structure characteristics) and lessened competition is clearly, we think, at the core of Section 7. For this reason, the specific issues of this case must be placed in a larger frame of reference. Section 7 deals with the fundamentals of a free competitive economic sys-

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[17] The rule applied in the *Philadelphia National Bank* case was one of presumptive illegality. The Court did not suggest that the substantial change in the concentration ratio in the relevant market as a result of the merger created an irrebuttable presumption that the merger would have the effects on competition specified in Section 7.

[18] *Brown Shoe Co., supra,* at 315. See *Philadelphia National Bank, supra,* at 363; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 306-07 (1960).

tem, and it is in the context of first principles that we must approach this case.[19]

In a market of, say, 100 sellers of roughly equal size, no seller need—or can—take into account his competitors' probable reactions in establishing his pricing or other business policies. No one seller in such a market is so powerful that he can retaliate effectively against a competitor who cuts prices or otherwise attempts to increase his market share; there are too many firms for deliberately interdependent pricing and other policies to be feasible (actual agreement, of course, would violate Section 1 of the Sherman Act); and no one seller's competitive behavior, however vigorous, is apt to endanger seriously the market share of any of his competitors, or even be apparent to them, since even if one seller increases his market share by 50%, the *pro rata* effect on each other seller's share will be only 1/200th. For these reasons, each seller is likely to establish his business policies in disregard of the actions of any individual competitor.

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[19] The discussion of oligopoly and related economic concepts in the following pages is drawn from works generally accepted as authoritative in the field. See, e.g., Bain, Barriers to New Competition (1956); Bain, Industrial Organization (1959); Chamberlin, The Theory of Monopolistic Competition (7th ed. 1956); Fellner, Competition Among the Few (1949); Machlup, The Economics of Sellers' Competition (1952); Business Concentration and Price Policy (National Bureau of Econ. Research 1955); Monopoly and Competition and Their Regulation (Chamberlin ed. 1954). See also Kaysen & Turner, Antitrust Policy (1959). The Supreme Court in the *Philadelphia National Bank* case, by its repeated citation of economic analyses such as the above works, has clearly indicated the propriety of a reviewing tribunal's consideration of such analyses in reaching its decision in a Section 7 case.

Conditions are very different in a market which has only, say, three sellers, each of equal size. If one cuts prices so as to increase his market share by 50% (i.e., to 50% of the market), each of his rivals will experience a 25% diminution in his respective market share. Unless they can operate profitably with their output thus curtailed, they must meet the price cut of their competitor. If there is active price cutting in such a market, the prices of all sellers will soon be forced down to the point at which they equal or barely exceed marginal cost—and no firm will be making a profit. Rather than incur price warfare that is bound to be mutually disadvantageous, each seller in a market of few sellers (an oligopolistic market) is likely tacitly to renounce price competition, and perhaps other forms of rivalry as well.[20]

What makes such tacit renunciation of price competition feasible in the oligopolistic market, as it is not in the atomistic market, is the fact that the attempt of one seller to increase his market share is bound to have significant repercussions upon the market shares of his competitors, who are compelled, in consequence, to retaliate immediately with a matching price cut. The price cutter "can't get away with it" for very long, and so he is better off refraining from systematic price cutting. The consequence of each firm's refraining from price competition is likely to be an unnaturally high price level in the market and a general deadening of competition. Price leadership, "conscious parallelism", excess capacity, emphasis on heavy advertising in lieu of technological innovation, and "administered prices", are some of the symptoms of oligopoly.

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[20] Bok, *supra*, note 18, at 310.

Of course, not all market structures are so easily classifiable as either atomistic or oligopolistic as those we have described. There is no ascertainable critical point, in terms of the number and size distribution of sellers in the market, at which behavior characteristic of the atomistic market ends and that characteristic of the oligopolistic begins, for everything depends on the psychology of business planners.[21] Analysis of market structure does not tell us at exactly what point a particular firm, by reason of its own and its rivals' market shares, will decide it can no longer afford to ignore the probable reactions of its competitors in setting business policy.

Three further points about market concentration should be made. The first is that a market may be oligopolistic though a number of small firms exist alongside the few dominant firms. See *Philadelphia National Bank, supra,* at 367. But the small firms, in such circumstances, will not enjoy the same freedom of action as they would in an atomistic market, for they will not be competing on equal terms with the dominant firms. Where the disparity in market shares as between competitors is very large, the competitive disadvantage of the small firms is apparent. For example, if a firm with a market share of 2% doubles its production, a firm with a 33⅓% share of the same market will lose 2% of its sales. This may well be a sufficiently sharp decline to induce the large firm to meet the small firm's competitive foray, and, if the large firm reacts with great vigor, the result may be the destruction of its small rival. For should the large firm, by dint of vigorous competitive conduct, increase its market share from 33⅓% to 40%,

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[21] "Oligopoly is . . . characterized by the state of mind of a seller *vis à vis* other sellers . . . ." Machlup, *op. cit. supra,* note 19, at 351.

the small firm's market share might shrink to nothing. In an oligopoly market, then, given the retaliatory power of companies having a strong market position,[22] small firms tend to exist at the sufferance of their large rivals, and for that reason are likely to opt for peaceful coexistence—not vigorous competition—with those rivals. Small firms in such circumstances characteristically pursue the "quiet life", following the price leadership of the dominant firms in the market and otherwise conforming to the competitive norms established by those firms.

The second point is that oligopoly behavior does not depend upon there being any fixed size ratio among the leading firms. Nor need there be more than a single dominant firm. A market in which one firm enjoys, say, a share of 70%, with the balance divided among a number of other firms, will still exhibit the characteristics of oligopoly. The leader will have the kind of market power that compels his rivals to take his reactions into account in their business planning, and his disproportionate strength will tend to deter his small rivals from vigorous competitive activity.[23]

The third point is that market concentration is a variable of market structure, not of market behavior.

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[22] See Comment, 68 Yale L. J. 1627, 1639, n. 57 (1959). Cf. Edwards, *Conglomerate Bigness As a Source of Power,* in Business Concentration and Price Policy, *op. cit. supra,* note 19, at 331, 335.

[23] Congress, indeed, appears to have been specifically concerned with the problem of single-firm dominance (short of outright monopoly) in amending Section 7. "The bill is intended to permit [legal] intervention . . . when the effect of an acquisition may be a significant reduction in the vigor of competition . . . . Such an effect may arise in various ways: such as . . . [an] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive". H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

Undue concentration itself is not a form of anti-competitive conduct, as, for example, raising prices in the face of declining demand may be; but undue concentration increases the probability that behavior in the market will be non-competitive. In distinguishing market "structure" from "behavior", we do not mean to suggest that our concern is limited to a static, abstract model of market relationships. As will be seen shortly, market structure in a particular industry depends in significant respects upon the techniques of competition, and other dynamic factors, prevailing in that industry.

Although concentration may be the most important market structure variable and the one that was in the forefront of Congressional deliberations on the anti-merger statute, it is not the only such variable and it cannot be adequately understood apart from others. For present purposes, the most significant market structure variable after concentration is the condition of entry into the market by new competitors.[24] No firm will contemplate entry into a new market unless it feels reasonably sure of being able to obtain a satisfactory market share. If the firms in a concentrated market use their market power to maintain a very high price level, the attractiveness of entry is enhanced. For, in such circumstances, the new entrant, by selling somewhat below the prevailing price level in the market, will be able to obtain a foothold in the market yet still operate well above his break-even point, so long as his costs are not substantially higher than those of the firms presently active in the market. Thus, the possibility of entry—potential competition

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[24] It is not the only other such variable, however. For example, competition may be affected by whether the number of buyers from the firms in the market is small (oligopsony).

—may exercise a restraining influence on oligopolists, who will be inclined to maintain a price level low enough to discourage entry, i.e., actual competition. For this reason the existence of barriers to entry into a concentrated market, which enable the established firms to raise prices above a low, entry-discouraging level, is a factor that bears significantly on the existence of oligopoly conditions in the market.[25]

At least three factors may retard entry. The first is the possession of cost advantages by the firms presently occupying the market vis-à-vis prospective entrants.[26] Such advantages may stem from, for example, control of patents, a scarcity of raw materials, or impeded access to channels of distribution (absolute cost advantages), or from scale of operation (advantages or economies of scale). In the case of absolute cost advantages, the prospective entrant can compete with the established firms only at a substantial disadvantage, and the chances that he will be able to obtain a reasonable position in the market are, in consequence, reduced. Even if the prevailing price level in the market is well above his cost level, he will be vulnerable to retaliation by established firms which have a lower cost level and hence a greater flexibility in pricing. As for advantages of scale, the prospective entrant, if he is to compete on equal terms with the established firms, must be prepared to operate

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[25] This is not to say, however, that the absence of substantial entry barriers will ensure effective competition in the market. See Bain, Barriers to New Competition 189 (1956).

[26] See Bain, Industrial Organization 249-51 (1959); Bain, *Conditions of Entry and the Emergence of Monopoly,* in Monopoly and Competition and Their Regulation 215, 226-36 (Chamberlin ed. 1954).

on a sufficiently large scale to be able to obtain the same advantages of scale enjoyed by the established firms. If the scale of optimum efficiency in the industry is substantial, a heavy initial investment may be required. To justify such an investment, the entrant must be in a position to obtain a large market share within a reasonable period of time. In these circumstances, the entrant is not only being made to play the competitive game for high stakes, but, by being forced to enter on a large scale, he is virtually ensuring a swift competitive response by the established firms. They might tolerate the obtaining of a small foothold by a new entrant, but they can hardly sit by while a large share of the market is absorbed by the newcomer.

Another, and perhaps more important, entry-retarding factor is "product differentiation".[27] The term refers to consumer preferences as between very similar, close-substitute products or brands. Such preferences need not, and frequently do not, rest on real or substantial differences in terms of quality or usefulness. By reason of distinctive packaging, the firm's long history, mass advertising and sales promotions, or other factors, a firm may succeed in establishing such a definite preference for its brand that the con-

[27] "[T]he most important barrier to entry discovered by detailed study is probably product differentiation." Bain, Barriers to New Competition 216 (1956). Some commentators, see, e.g., Kaysen and Turner, Antitrust Policy 74 (1959), follow Chamberlin in classifying product differentiation as a distinct market structure variable, rather than subsume it under condition of entry. Since, as will appear, condition of entry as we use that term is relevant not only to new entry, but equally to the competitive vigor of the existing firms in the market, it is of no practical significance whether product differentiation be deemed an independent factor or an aspect of condition of entry.

sumer will pay a premium to obtain it, although it is functionally identical to competing brands. Such brand allegiance, which the prospective entrant, marketing a new brand, will not, of course, command, may be the cumulative result of the expenditure of many millions of dollars over a period of many years to promote the brand, and may, in consequence, be very difficult to counteract even if the entrant makes a very substantial initial investment to promote his own brand.[28] As a result, in an industry in which product differentiation is an important factor, not only may the new entrant find it especially difficult to pry customers loose from the established firms, but the higher price obtainable for a brand that has been successfully differentiated in the public mind from competing brands may impart a flexibility in pricing, akin to that imparted by cost advantages, which the newcomer may not be able to achieve for many years.

The third entry-retarding factor is the financial

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[28] See Bain, Industrial Organization 240, 250, 320 (1959); Bok, *supra* note 18, at 239. The Supreme Court has given explicit recognition to the role, in the repulsion of new competition, of heavy expenditures for product differentiation:

> "The record is full of the close relationship between . . . large expenditures for national advertising of cigarettes and resulting volumes of sales . . . . Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 797.

size or strength of the established firms in comparison to that of prospective entrants. Plainly, entry is more effectively deterred by the prospect of an established firm which can well afford to meet a competitive challenge, than by the prospect of a firm small compared to the entrant (though large in its market) or in poor financial condition.

The three entry-retarding factors obviously interact, most notably perhaps in industries in which the dominant firms have succeeded in differentiating their products through mass advertising and sales promotions. As noted earlier (see p. [55] above), advertising in the mass media may not be optimally efficient except on the part of a firm which operates on a national scale; and, obviously, advertising on a national scale demands considerable financial strength. Moreover, the effectiveness of advertising and sales promotions would appear to increase, at least up to a certain point, in direct proportion to their volume. A seller with an advertising and sales promotion budget twice that of his principal competitor not only may be able to recoup his additional selling costs in the premium price that he is able to charge for his brand; in addition, his more intensive advertising and promotional efforts are very likely to increase his market share at the expense of his rivals, because the more advertising and promoting a firm does, the more intensively is the public exposed to and persuaded to buy the firm's brand. Thus, financial strength and large absolute size may be indispensable attributes in enabling a substantial market share to be acquired and maintained in industries characterized by product differentiation through advertising and promotions.[29] At the

[29] See Bain, Industrial Organization 172-73 (1959); Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, 20 J. of Marketing 336, 341 (1956).

same time, given the extent to which effectiveness in the utilization of advertising and other promotional activities seems to be a function of size and strength, the scale necessary for a firm to operate at optimum efficiency in the market may become very large indeed. See Bain, Barriers to New Competition 138 (1956).

It is important to note that the factors making for high entry barriers also make for domination of small competitors by large, and so tend to eliminate actual as well as potential competition. If the large firm enjoys substantial competitive advantages by virtue of product differentiation, cost advantages or financial strength, any attempt by a small firm to expand its market share at the expense of the large firm is unlikely to succeed.[30] By the same token, should the large firm desire to expand its market share, the small firm, lacking comparable financial reserves, pricing flexibility, or a reservoir of accumulated consumer preference, is apt to be the first to lose ground. The power to repel or discourage new competitors, then, is the power to control or discipline existing competitors, to make them reluctant to engage in conduct, such as price cutting, which might provoke retaliatory action on the part of the dominant firms. In

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[30] "In many cases . . . the most important benefit [from increased firm size] is the ability to support far larger budgets for advertising and promotion than a small firm could feasibly assume. Thus, by growing larger, the producer of a retail commodity can increase its capacity to establish consumer preferences for its product to an extent that cannot easily be matched by its smaller rivals. In this way, the relative strength of the largest firm is enhanced, since efforts by smaller concerns to expand their share of the market will tend to be somewhat blunted by the popularity of the more highly advertised product." Bok, *supra* note 18, at 276. See Bain, Industrial Organization 174 (1959).

sum, high entry barriers, like excessive concentration, impair effective competition.

Fourth. The concept of competition upon which Section 7 rests has aspects which transcend the narrowly economic. "Other considerations [besides the danger to the economy posed by unchecked corporate acquisitions] cited in support of the bill [to amend Section 7] were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose." *Brown Shoe Co., supra,* at 315-16.[31] One commentator has suggested that the legislative history of Section 7 invites "reliance upon a structural theory of competition which stresses the advantages of large numbers of small-sized firms." [32]

We cannot shut out the broad policy considerations which figured so prominently in the deliberations leading to Section 7, however difficult they may be to translate into precise legal criteria. To disregard them, moreover, would be to close our minds to a persistent theme in federal trade regulation. "Throughout the history of these statutes [the federal antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States* v. *Aluminum Co. of*

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[31] The legislative history is reviewed by Bok, *supra,* note 18, at 234-37, 247.

[32] Bok, *supra* note 18, at 247. Professor Bok, however, criticizes such a test as unworkable. *Id.,* at 248.

America, 148 F.2d 416, 429 (2d Cir. 1945).[33] On the other hand, there is no warrant in the language or history of Section 7 for subordinating the protection of *competition* to the protection of small-business *competitors.*[34]

If the effect of a merger is to place a number of small firms at a severe competitive disadvantage, and the merger cannot be shown to enhance the general competitive vigor of the market, it may be appropriate, in implementing Section 7, to note Congress' patent concern with the preservation, to the extent compatible with social and economic progress, of the fundamental benefits of a small-business, decentralized economy. The interest in fostering equality of opportunity for small business and in promoting the diffusion of economic power, although it may not be identical to the economists' notion of competition, was unquestionably intended by Congress to be relevant in any scheme for the enforcement of Section 7.[35]

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[33] See Thorelli, The Federal Antitrust Policy: Origination of an American Tradition 227 (1954); Dirlam & Stelzer, *The DuPont-General Motors Decision: In the Antitrust Grain,* 58 Col. L. Rev. 24, 41 (1958).

[34] See *Philadelphia National Bank, supra,* at 367, n. 43; *Brown Shoe Co., supra,* at 320; *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 588, 592 (S.D.N.Y. 1958).

[35] Compare Adelman, *supra* note 12, at 236; Dewey, *Mergers and Cartels; Some Reservations About Policy,* 51 Am. Econ. Rev. 255, 261-62 (Papers and Proceedings, 1961). "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co., supra,* at 344.

Fifth. Section 7 embodies a *preventive* antitrust philosophy; Congress wanted the enforcement agencies to be able to arrest the anti-competitive effects of market power in their incipiency. A corollary of Section 7's prophylactic function is that the requirements of proving a violation are less strict than they would be under the Sherman Act. A further corollary is that evidence of market behavior, as opposed to evidence of market structure, is not a necessary ingredient of the prima facie case. If the enforcement of Section 7 against a particular merger were impossible until actual non-competitive practices had been discovered in the market affected by the merger, all opportunity to attack those practices at their root would be lost. Economists teach, and Congress, in enacting the amended Section 7, postulated, that market behavior follows market structure; hence, proof that a merger has created or aggravated a market structure conducive (in a practical, not theoretical or abstract, sense) to practices that substantially lessen competition, or tend to monopoly, is sufficient under the statute. Cf. *Brown Shoe Co., supra,* at 322.

The preventive philosophy reflected in Section 7 has significance not only in fixing the requirements of a prime facie case in a Section 7 proceeding, but in defining the standards of relevancy and materiality governing such a proceeding. The Supreme Court has been quite explicit as to the latter:

> ". . . [T]he ultimate question under § 7 [is] whether the effect of the merger 'may be substantially to lessen competition' in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger

upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *Philadelphia National Bank*, *supra*, at 362 (citations omitted). See *Brown Shoe Co.*, *supra*, at 341 & n. 68; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 313.

The Court's emphasis appears to be twofold. On the one hand, a statute aimed at arresting practices in their incipiency can deal only with broad probabilities. The very nature of such a statute makes a quest for certainty delusive.[36] This is especially true in an area in which lawyers, not trained in economic analy-

[36] "A preventive antitrust policy . . . should be directed at activities which on their face have a general and important tendency to reduce competition . . . ." Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 177 (1955). Cf. *Brown Shoe Co.*, *supra*, at 323 (Congress' "concern was with probabilities, not certainties").

sis, must nonetheless grapple with what must often appear to be an unintelligible mass of complex economic materials. Not surprisingly, the less sophisticated in economic matters a lawyer is, the more "thorough" a job of economic inquiry he is likely to believe necessary.[37] The emergence of a class of business practices as to which, under the Sherman Act, a substantial anti-competitive effect is conclusively presumed (so-called *per se* offenses) testifies to the exigent need of simplifying the economic issues in antitrust litigation. Even where a *per se* rule is inappropriate, some limitation of the scope of economic inquiry will almost always be necessary and proper, for "the demand for full investigation of the consequences of a market situation or a course of business conduct is a demand for nonenforcement of the antitrust laws." Mason, *Market Power and Business Conduct: Some Comments*, 46 Am. Econ. Rev. 471, 478 (Papers and Proceedings, 1956). In a Section 7 proceeding, an inquiry bent on obtaining and digesting all data arguably relevant in making "some ultimate reckoning of social or economic debits and credits" of the merger (*Philadelphia National Bank*, *supra*, at 371), but not genuinely probative in making "an appraisal of the immediate impact of the merger upon competition . . . [and] a prediction of its impact upon competitive conditions in the future" (*id.*, at 362), is inevitably self-defeating as the Commission's experience in this class of cases has amply demonstrated.

Furthermore, the danger is acute that if proceedings under Section 7 are allowed to become top-heavy with masses of economic and business data which are

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[37] "[E]rrors in logic and inference will increase when large amounts of complex data must be considered in a conceptual framework that is but partially understood." Bok, *supra*, note 18, at 295.

not strictly probative, the statute will become useless as an enforcement tool. In a merger proceeding, relief short of divestiture is rarely adequate. But divestiture is not a practical remedy unless it is accomplished within a reasonable time after the consummation of the merger. If too much time elapses, the property, good will, management, customers, business opportunities, and other assets and attributes of the acquired and acquiring firms tend to become irremediably commingled, and the acquired firm may lose all vestiges of independence. It may be impossible to reconstitute the acquired firm as a going concern; the patient, as it were, will be too far gone for medicine, or even radical surgery, to do him any good.

Other interests press for the simplyifying and expediting of Section 7 proceedings. One is the interest in business stability and progressiveness. While an action under Section 7 is pending, the business decisions of the merged firm may be characterized by hesitancy and indecisiveness, due to uncertainty about the future of the firm. So also, perfectly lawful mergers may be deterred by the prospect of protracted legal proceedings whose outcome cannot reasonably be predicted. Finally, the effectiveness of Section 7 to check, where necessary in the interest of protecting competition, the very large annual wave of mergers [38] will be impaired if the limited staff and budget of this Com-

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[38] In 1959-61, an average of 650 firms disappeared annually through mergers—more than at any time since 1926-30, the crest of the last great merger movement. These figures are rough estimates, are confined to manufacturing and mining firms, and probably underestimate the actual number of mergers even among those firms. See Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, *op. cit. supra* note 13, at 266. This Commission counted, for example, 1260 industrial mergers in 1962. F.T.C. News Release, Feb. 8, 1963.

mission (and of the Antitrust Division of the Department of Justice) that can be devoted to the enforcement of Section 7 are allowed to be frittered away in unduly complex and protracted proceedings.

That effective relief in a Section 7 proceeding becomes increasingly difficult, to the point of impossibility, over time, coupled with the other considerations we have mentioned, argues in favor of sharply narrowing, wherever possible, the scope of permissible legal inquiry. Clear and relatively simple rules, and the rigorous exclusion of evidence which bears only remotely upon the central concerns of the statute, are essential if Section 7 is not to become a judicial and administrative nullity.

Specifically, we think that the admission of post-acquisition data is proper only in the unusual case in which the structure of the market has changed radically since the merger—for example, where the market share of the merged firm has dwindled to insignificance—or in the perhaps still more unusual case in which the adverse effects of the merger on competition have already become manifest in the behavior of the firms in the market. See *Reynolds Metals Co.* v. *F.T.C.*, 309 F.2d 223 (D.C. Cir. 1962). If post-acquisition data are to be allowed any broader role in Section 7 proceedings, a respondent, so long as the merger is the subject of an investigation or proceeding, may deliberately refrain from anti-competitive conduct—may sheathe, as it were, the market power conferred by the merger—and build, instead, a record of good behavior to be used in rebuttal in the proceeding. One consequence of a receptive attitude toward post-acquisition evidence on the part of the tribunals deciding Section 7 cases is that there will be frequent remands for further such evidence, as the instant case illustrates, until eventually the proceeding may be-

come so protracted as to preclude effective relief, or may terminate in the respondent's favor only because his good-conduct evidence has been considered persuasive. At that point, the respondent is free to take the wraps off the market power conferred by the merger.

More important, given the nature of the concerns that moved Congress to amend Section 7, post-acquisition evidence will rarely have substantial probative value even if the respondent's post-acquisition conduct is not influenced by the threat of legal action. Congress postulated that certain kinds of market structure would ordinarily lead to non-competitive company behavior. If a market structure conducive to non-competitive practices or adverse competitive effects is shown to have been created or aggravated by a merger, it is surely immaterial that specific behavioral manifestations have not yet appeared. In many cases, the converse will also hold true. The fact that non-competitive practices have persisted or even increased in the market since the merger may reveal little about the merger's effects. The behavior of firms is a complex matter; it may be impossible to separate out the various causal factors so precisely as to be able to attribute non-competitive behavior to a particular merger. The same strictures apply to evidence of changes in market *structure* that have occurred since a merger. The full significance of such changes may not become apparent until long after they occur, and their relationship to a particular merger is likely to be obscure.

At all events, the ineffectuality of a wait-and-see policy on the part of the agencies charged with the enforcement of Section 7 should be obvious. If the agencies postpone the commencement or completion of an action challenging a merger in order to see what

trends or results will stem from it, they thereby disable themselves from obtaining or granting effective relief. It bears repeating that an order divesting corporate assets that were acquired a long time before the issuance of the order rarely advances the policies of Section 7.

C. *The Effects of the Instant Merger on Competition*

With the foregoing general principles in mind, we now address ourselves to the ultimate question in this, as in every Section 7, case: whether the effect of the particular merger "may be substantially to lessen competition, or to tend to create a monopoly", "in any line of commerce in any section of the country."

The relevant line of commerce (product market) in this case is alleged to be household liquid bleach (5¼% sodium hypochlorite solution). No contention is made that industrial bleach should be included, and the contention, urged below by respondent, that dry or powdered bleach is sufficiently interchangeable with liquid bleach to be part of the same line of commerce, has not been pursued on appeal. It is clear, at all events, that the examiner's exclusion of powdered bleach from the relevant line of commerce was correct. The evidence shows that liquid and dry bleaches are used for different purposes: dry bleaches are in the light-duty category; liquid bleaches are in the heavy-duty category. Dry bleaches are approximately twice as expensive to use as liquid bleaches and their primary utility is in bleaching fine fabrics that do not respond well to stronger bleaches. To the consumer, liquid and dry bleach are economically and functionally distinct products that are poor substitutes for each other. See *Reynolds Metals Co.* v. *F.T.C.*, 309 F.2d 223, 226-27 (D.C. Cir. 1962);

Crown Zellerbach Corp. v. *F.T.C.*, 296 F.2d 800, 811 (9th Cir. 1961). In any event, at the time of the merger dry bleach accounted for only about 10% of total household bleach sales, so that even if it were included as part of the relevant product market, the market shares of Clorox and its competitors would not be changed substantially.

The relevant geographical market in a Section 7 case ("section of the country") is, in the words of the Supreme Court, "where . . . the effect of the merger on competition will be direct and immediate." *Philadelphia National Bank, supra*, at 357. The complaint charges that the effects of the merger on competition will be felt in the national market for household liquid bleach and in a number of regional submarkets as well. Since high shipping costs impose definite territorial limitations upon the distribution of household liquid bleach, and since Clorox is the sole producer for the national market, the appropriateness of appraising the merger in terms of its alleged impact upon the national market is somewhat questionable. The effects of Procter's acquisition of Clorox will be felt differently in the different regions of the country, according to the market position occupied by Clorox *vis-à-vis* its competitors in each region. Cf. *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D. N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958). No uniform national impact can be forecast.

Despite the fact that the proper sections of the country in this proceeding are a series of distinct regional markets, no attempt has been made to demarcate these markets, and it is probably not a feasible undertaking.[39] In such circumstances, it is appropri-

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[39] The regional breakdowns given in the A. C. Nielsen Food Index (see p. [54] above) represent standardized zones which

ate to use aggregate national figures as approximations of conditions obtaining in the several regional markets. Cf. *Brown Shoe Co., supra*, at 342-43. If anything, the use of such figures favors respondent. Even if the regional sales figures in the Nielsen Index cannot be accepted as accurate market share percentages, they strongly suggest that in many of the geographical markets for liquid bleach Clorox's market share must be considerably higher than its national average, in places approaching monopoly proportions.

Having established the relevant market, we are prepared to analyze its structure, disregarding, for the moment, the impact of the merger upon it. Manifestly, the household liquid bleach industry is highly concentrated and oligopolistic. A small number of firms (6) account for an overwhelming proportion of the industry's sales (80%), and what is left is divided among firms which, absolutely and relatively, are very small. The concentration ratio, in other words, is that characteristic of oligopoly.[40] Among the market

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Nielsen uses for all grocery products, and are not drawn so as to reflect meaningful geographical markets for the household liquid bleach industry. In rejecting these zones as geographical markets for present purposes, we do not mean to suggest that extremely rigorous standards of proof in this area are appropriate or allowable. The Supreme Court has cautioned that certainty in the calculation of the relevant market cannot, and need not, be achieved. *Philadelphia National Bank, supra*, at 361.

[40] Professor Bain would probably categorize the household liquid bleach industry as "highly concentrated". See Industrial Organization 127 (1959). Professors Kaysen and Turner would categorize it as a "Type One structural oligopoly", wherein "the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent of total market sales." Antitrust Policy 27 (1959). In the *Philadelphia National Bank* case, after the merger the

leaders, a single firm, Clorox, is dominant.[41] It enjoys almost 50% of the total sales of the industry. Moreover, as the only national seller in an industry strongly characterized by product differentiation through advertising, Clorox enjoys a decisive competitive advantage, and has succeeded in creating a definite consumer preference for the Clorox brand, enabling it consistently to be priced at or above the level of any competing brand. In point of either market share or financial strength, no firm except Purex can be regarded as a significant competitive factor in the industry, and Purex does not compete with Clorox at all in about one-half of the nation. Indeed, in several areas of the country, Clorox faces no competition whatever from the principal firms, such as they are, of the industry (see [pp. 53-54] above).

The factors which make for dominance by Clorox of its rivals also make for formidable barriers to new entry. To be fully efficient, a new entrant into the bleach industry would have to advertise and operate from the outset on at least a broad regional scale,[42] and consequently incur a very heavy initial investment for advertising. To undertake to operate on such a large scale profitably, a prospective entrant must, as we noted earlier, be able to obtain a substantial market share within a reasonable period of time. But if a firm did succeed in acquiring a significant share of one of the regional liquid bleach markets, it

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leading firm in the relevant market had a 30-35% share, and the top 4 firms combined, roughly 78%.

[41] "[W]hen one firm has forty or fifty per cent or more [of the market] . . . competition will seldom plague the industry." Stigler, *supra* note 36, at 181.

[42] Cf. Bain, *Advantages of the Large Firm: Production, Distribution, and Sales Promotion*, *supra*, note 29, at 344.

would almost certainly provoke a competitive response from Clorox, which could not afford to remain passive in the face of a significant encroachment upon its market position. In the resulting competitive struggle, Clorox, by reason of the substantial accumulated consumer preference for the Clorox brand, would have a great advantage.

There is evidence in this case that before a new brand of liquid bleach can be safely launched, it must be test-marketed locally. Since Clorox is active in every part of the country, it is in a position, by responding promptly to every such test, to prevent a prospective entrant from acquiring the market data it needs in order even to begin to compete. Indeed, this is what Purex claims Clorox did in Erie, Pennsylvania—responded so promptly and vigorously to Purex's competitive sortie that Purex was unable to complete the test-marketing of its new container (see p. [56] above). This incident illustrates, moreover, the two-edged quality of Clorox's dominant position. Not only is it a significant impediment to new entry; it is also an effective barrier to the growth or expansion of Clorox's existing rivals in the bleach industry, and thus an inhibitor of vigorous competitive activity.

Clorox's dominant position in the liquid bleach industry is dramatically shown by the fact that Procter, the nation's largest advertiser and perhaps leading manufacturer of household products comparable to liquid bleach, preferred to pay a very large premium for the good will of Clorox (the $17,700,000 difference between the purchase price of Clorox, $30,300,000, and the valuation of Clorox's assets, $12,600,000, suggests the size of this premium), rather than enter the industry on its own. Few firms—certainly none of the firms now active in the liquid bleach industry, with the possible exception of Purex—are in a posi-

tion to make the investment evidently required to become a fully effective competitor in the liquid bleach industry. Perhaps entry or slight market expansion on the part of very small, neighborhood bleach producers is possible notwithstanding Clorox's dominant position. But the conclusion seems inescapable that at the time of the merger, the industry was concentrated, and barricaded to new entry, to a degree inconsistent with effectively competitive conditions.

What are the consequences for competition if, in an industry such as we have described, a firm such as Procter is substituted for the industry's dominant firm? We find that there are significant areas in which absorption by Procter is likely to affect Clorox's competitive position.

In the first place, the record shows that in the liquid bleach industry the merger of a relatively small, single-product firm with a very large, multi-product firm enables substantial cost savings and other advantages in advertising and sales promotion, especially in television advertising.

The maximum annual volume discounts available to the largest advertisers amount to 25-30% for network television advertising and somewhat smaller but still substantial percentages for magazine, newspaper, and radio advertising. In addition, the discount rates available for local "spot" television advertising favor the large advertiser. In 1957, Clorox spent $1,150,000 on television advertising of all kinds on all stations. While complete discount rates are not included in the record, it is virtually certain that an expenditure of this size spread over all networks and stations did not entitle Clorox to discounts of any substance. For example, a $3,000,000 expenditure on NBC or CBS night time is required for the maximum discount. The record shows that Purex, in time bought in behalf of

its complete line of products, received a 6% discount on an expenditure of $1,400,000 on one network, and a 15% discount on an expenditure of $2,400,000 on another. This was possible because Purex, unlike Clorox, is a multi-product firm, and because an advertiser can combine all of his advertising for all of his products to obtain the volume discount, which is then applied to the advertising for each brand. It is conceded that Procter is entitled to, and receives, the maximum volume discounts available in television advertising and, no doubt, in other media as well. With Clorox now a part of the Procter line, for the same amount of money Clorox spent on network television advertising prior to the merger, at least 33⅓% more network television advertising can now be obtained.

Analogous benefits are obtainable in the other advertising media. The record discloses that maximum volume discounts of between 12% and 17% are available to advertisers in the leading women's or family magazines. An annual expenditure of $1,000,000 or more may be necessary to earn the maximum in a particular magazine. Prior to the acquisition, Clorox received no discounts for magazine advertising. Purex, the record shows, received a small discount in one magazine.

The scale advantages of a large, multi-product firm in advertising are not limited to volume discounts. According to uncontradicted evidence of record, a commercial announcement during a television program is substantially more effective in promoting a product than one during the between-program station break. Not only is the viewer apt to be less attentive during the station break—he may be switching stations, or he may leave the room momentarily—but a brand becomes better known to the consumer by being associated with a program which the consumer watch-

es. Unless Clorox had been willing to put a disproportionate share of its advertising budget into a single venture, it could not, prior to the acquisition, have afforded to buy an entire network television program. Cf. *United States* v. *Lever Bros. Co.*, 216 F. Supp 887, 899 (S.D.N.Y. 1963). Procter, however, can and does buy the sponsorship of such programs in behalf of several of its products, and this means that if Procter includes Clorox among the products advertised on such a program, Clorox can realize the advantages of network program advertising at a fraction of the cost that would have been required prior to the merger. Moreover, even if Clorox could have purchased sponsorship of a program prior to the merger, the same investment, if used now to buy one-third of three shows sponsored by Procter, will result in broadened consumer exposure to the Clorox brand, thereby increasing the effectiveness of the investment.

Another advantage in network program advertising that can be derived from the association of Clorox with Procter arises from the ability of a multi-product national advertiser to run commercials for different products in different sections of the country during a single commercial break. If Procter decides that Clorox needs advertising support in some area where Clorox faces particularly intense competition, it can place a Clorox commercial in that area, and that area only, while the remainder of the country is watching a commercial for one or more of Procter's other products. Clorox thereby gains the advantage of association with network television while actually limiting its advertising expenditures to selected regional markets.

Similar advantages are obtainable by joint promotions, and by joint advertising in the other media. Procter can incorporate promotions for Clorox on the

same in-store display cards as are used for other Procter products and thus receive point-of-sale promotion for several products at the cost of printing, distributing and installing one set of cards. Similarly, premium and special-offer coupons for Clorox can be mailed in the same envelope as those for other Procter products. In this way Clorox reaps the advantage of this type of promotion without having to pay full processing and mailing costs or make the initial investment necessary to launch this promotional method. The record shows that Procter has frequently engaged in combined-product displays and promotions of this sort.

Joint newspaper or magazine advertising of Procter products, including Clorox, also offers the possibility of considerable cost advantages.

A related point is that while prior to the merger Clorox distributed bleach to retailers by means of a network of independent brokers, Procter has a direct sales force for its products, and, were Procter to distribute Clorox bleach through this sales force, distinct promotional advantages would probably result. Independent brokers handle the products of many manufacturers and frequently carry competing brands; they have no particular interest in pushing one brand rather than another. Procter's sales force deals only in Procter products and spends considerable effort assuring these products adequate and prominent shelf space and special displays. In light of the critical role played by shelf space in liquid-bleach competition, use of a direct sales force—a device that may be fully efficient only for a multi-product firm—would in all likelihood substantially increase Clorox's already great market power.

The acquisition also has consequences for the bargaining position of Clorox in its dealings with retail-

ers of liquid bleach. That Procter is the leading producer of a number of products marketed through grocery stores may enable it to induce retailers to give favored treatment to Clorox in the crucial fight for shelf space or otherwise concede especially advantageous terms involving the retail selling of Clorox bleach. We need not go so far as to find that leverage of the kind that supports tie-in and full-line forcing arrangements may be Procter's to wield in behalf of Clorox. Given Procter's position as a well-established producer of a broad range of common grocery items —many of them "must" items (see p. [117] below)—it would seem likely that Procter can obtain from retailers, as a matter not of coercion but of convenience or expediency, certain advantages in the display or marketing of its products which are not available to a single-product producer, such as the pre-merger Clorox. Cf. Machlup, The Political Economy of Monopoly 111-12 (1952).

Another material consequence of the merger is the advent, in the liquid-bleach industry, of a firm with a breadth of experience and degree of financial strength beyond anything possessed by the existing members of the industry. We have already indicated the importance of absolute size in effective advertising; Procter's size, whether measured by sales or assets, is many times greater than that of the largest firm operating in the industry prior to the merger. Furthermore, there is testimony in the record that sales promotions are considered in the main too expensive for a single-product firm in the relatively small-scale bleach industry; thus, at the time of the merger, Clorox was engaged in virtually no sales-promotion activities. Procter, a firm that in 1957 incurred sales-promotion expenses in an amount greater than Clorox's total sales, is in an obvious position to

utilize the sales-promotion technique on a wide scale in behalf of Clorox.

Financial ability, moreover, may play a substantial competitive role in an industry such as liquid bleach quite apart from advertising and sales promotions. The record shows that one way in which a producer may obtain increased shelf space is by offering the merchant a special price, thus enabling the merchant to obtain a higher resale profit margin. To be able to do this frequently and effectively requires the kind of pricing flexibility available only to a firm with ample reserves. So also, it is a fact that consumer preferences for particular liquid bleach brands, even for Clorox, are not invulnerable to competitive inroads; the Erie, Pennsylvania, incident (see p. [56] above) demonstrates the prevalence of local price cutting. Even local price cutting, however, cannot long be maintained by a firm short on reserves. In a price fight to the finish, Procter, whose aggregate scale of operations and fiscal resources dwarf the entire liquid bleach industry, can hardly be bested.

Consideration must also be given to the danger that a multi-product firm such as Procter, operating in a market otherwise consisting of single-product firms, may engage in systematic underpricing having most unfair and destructive effects even though the firm is wholly innocent of any predatory intent. "[T]otal profit may be maximized [in a multi-product firm] . . . by selling some lines below accounting costs." [43]

[43] Thorp & Crowder, The Structure of Industry 667 (T.N.E.C. Monograph No. 27, 1941). "[D]iversification may so cloud a concern's cost structure as to result in the shelter of inefficiently made products; a given product may be subsidized without the knowledge of its producer." Hale, *supra*, note 8, at 361.

"A concern that produces many products and operates across many markets need not regard a particular market as a separate unit for determining business policy and need not attempt to maximize its profits in the sale of each of its products, as has been presupposed in our traditional scheme. It may classify its products into such categories as money-making items, convenience goods, and loss leaders, and may follow different policies in selling the different classes." Edwards, *Conglomerate Bigness As a Source of Power*, in Business Concentration and Price Policy 331, 332 (National Bureau of Econ. Research ed. 1955).

Thus, the greater flexibility in pricing enjoyed by the multi-product firm may lead, without predatory motive or purpose, to below-cost selling of a particular product which is in competition with a small firm's single product.

In addition to the concrete competitive advantages in liquid bleach competition which stem from Procter's substitution for Clorox in the liquid bleach industry, some account must be taken of certain intangibles of reputation which Procter unquestionably possesses. Whether or not Procter is in fact a well-managed and aggressive competitor, a question on which the record in this case permits no expression of opinion, the record does disclose that Procter is so regarded by the firms in the liquid bleach industry. To them, Procter is a more feared competitor than was the pre-merger Clorox. Since, as was noted earlier, market behavior is determined by the state of mind of the firms in the market, Procter's history of success, its general size and its prowess, which loom large in the eyes of the small liquid bleach firms, must

for that reason alone be reckoned significant competitive factors.

Enough has been said to establish that the merger of Procter and Clorox adversely affects the market structure of the liquid bleach industry. While the merger has no immediate impact on the number or size distribution of firms in the market, it does have an immediate impact upon another important variable of market structure—the condition of new entry. Procter, by increasing the Clorox advertising budget, by engaging in sales promotions far beyond the capacity of Clorox's rivals, and by obtaining for Clorox the advertising savings to which Procter, as a large national advertiser, is entitled, is in a position to entrench still further the already settled consumer preference for the Clorox brand, and thereby make new entry even more forbidding than it was prior to the merger. In addition, because a multi-product firm of large size enjoys, as has been seen, very substantial competitive advantages in an industry strongly marked by product differentiation through mass advertising, sales promotions, shelf display and related merchandising methods, the prospects become increasingly remote, given the substitution of Procter for Clorox in the liquid bleach industry, that small or medium-sized firms will be minded to enter the industry. The scale of optimally efficient operation in the industry has been so increased, by reason of Procter's advent, that only very large firms—firms on the scale of Procter itself—can reasonably be expected to be able to compete on roughly equal terms in the industry.

In short, the barriers to entry, already very high, have been markedly heightened by the merger—to the point at which few firms indeed would have the temerity or resources to attempt to surmount them.

And, as has been observed, a heightening of entry barriers concomitantly enhances the power of market leaders to dominate their small rivals, and so smother effective competition. Given Procter's materially greater strength, compared to Clorox, as a liquid bleach competitor, vigorous competition by the small firms in the industry would appear still more effectively and substantially inhibited than prior to the merger.

Our finding that, as a result of this merger, the market structure of the liquid bleach industry is significantly less conducive to competition than was the case prior to the merger, is not in any way dependent upon the actual course of Procter's post-merger conduct. We need not attempt to ascertain or predict whether, and to what extent, Procter has taken or will take active steps to obtain for Clorox the potential scale or other advantages accruing from the merger. As has been pointed out, the conditions which retard competition in an industry are to an important degree psychological. They stem from competitors' appraisal of each other's intentions, rather than from the intentions—or the actions taken upon them—themselves. The appropriate standpoint for appraising the impact of this merger is, then, that of Clorox's rivals and of the firms which might contemplate entering the liquid bleach industry. To such firms, it is probably a matter of relative indifference, in setting business policy, how actively a Procter-owned Clorox pursues its opportunities for aggressive, market-dominating conduct. The firm confined by the high costs of shipping liquid bleach, and the high costs of national or regional advertising, within a geographically small area, cannot ignore the ability of a firm of Procter's size and experience to drive it out of business (not necessarily deliberately) by a sustained lo-

cal campaign of advertising, sales promotions and other efforts. See Blair, *The Conglomerate Merger in Economics and Law*, 46 Geo. L.J. 672, 688-89 (1958). A small or medium-sized firm contemplating entry cannot ignore the fact that Procter is a billion-dollar corporation whose marketing experience extends far beyond the limited horizons of the liquid bleach industry and whose aggregate operations are several times greater than those of all the firms in the industry combined. Even a large firm contemplating entry into such an industry must find itself loath to challenge a brand as well-established as Clorox bleach, when that brand is backed by the powerful marketing capacities of a firm such as Procter.

If we consider, in other words, not what Procter will in fact do to exploit the power conferred on it by the merger, or has done, but what it can and is reasonably likely to do in the event of a challenge to its dominant market position in the liquid bleach industry, we are constrained to conclude that the merger has increased the power of Clorox, by dominating its competitors and discouraging new entry, to foreclose effective competition in the industry.

D. *The Substantiality of the Instant Merger's Anti-Competitive Effects*

In finding that the merger of Procter and Clorox has an undesirable effect, from the standpoint of maintaining competition, on the market structure of the liquid bleach industry, we have not determined the legality *vel non* of the merger under Section 7. The statutory test, whether the effect of the merger may be *substantially* to lessen competition, or tend to create a monopoly, has yet to be applied to the facts as found.

The language of Section 7 refutes any notion that every merger whose probable effect on competition is adverse is, for that reason, unlawful. Congress plainly meant to exclude from the proscription of Section 7 mergers having a negligible, abstract, or merely theoretical impact upon the structure of the relevant market. The impact must be significant and real, and discernible not merely to theorists or scholars but to practical, hard-headed businessmen; in a word, it must be "substantial". But substantiality, in the sense used in Section 7, is not a precisely ascertainable quantity; if the statute is to have meaningful application, the courts and the Commission must be content with approximations and estimates. In the *Philadelphia National Bank* case, the Supreme Court confronted with a conventional horizontal merger, held that where such a merger conferred a 30% market share on the acquiring firm and significantly enhanced the combined market shares of the leading firms in the market (by more than 33%), the merger was unlawful, absent mitigating circumstances. The percentages selected by the Court as manifesting undue concentration were admittedly only rough indicators that the merger would have the effect on competition specified in Section 7; but, in the absence of any more precise indicators, they were deemed to satisfy the statute's requirements.

The merger at bar, because it is not a conventional horizontal or vertical merger, does not afford the tribunal which must decide its legality the ready crutch of percentages. The market structure variable—condition of entry—here involved, unlike concentration (or foreclosure, in the case of a conventional vertical merger), is not even roughly translatable into a percentage. We cannot say that barriers to new entry into the liquid bleach industry have been raised, as a

result of this merger, by 10%, 50% or any other exact figure. Nor do the raw figures on, say, cost savings in advertising enabled by the merger permit any dependable quantitative appraisal of the impact of the merger on existing barriers to entry. But the difference here between substantial and insubstantial, like that between night and day or childhood and maturity, is no less real because the dividing line cannot be precisely drawn.

If mergers not falling within certain familiar categories, such as "horizontal" and "vertical", are to be effectively subject to Section 7, as Congress plainly intended them to be, other means—non-percentile and non-quantitative—of roughly, but fairly, estimating the substantiality of a merger's probable adverse effect on competition in the relevant market, must be found. There is, of course, only one place to look for such tools—the area of the basic policy considerations which moved Congress to enact Section 7 in its amended form and which must therefore govern the enforcement of the statute. We find that there are five factors in this case which, taken together (we need not, and do not, consider whether one or more of these factors, taken separately, would be dispositive of the case), persuade us that the instant merger violates Section 7. This set of factors plays the same role in the decision of this case as percentage ratios play in the decision of other merger cases, that of enabling the deciding tribunal to infer with reasonable assurance that the merger has the specified statutory effect, namely, of probably lessening competition substantially; or tending to create a monopoly, in the relevant market. These factors are: (1) the relative disparity in size and strength as between Procter and the largest firms of the bleach industry; (2) the excessive concentration in the industry at the time of

the merger, and Clorox's dominant position in the industry; (3) the elimination, brought about by the merger, of Procter as a potential competitor of Clorox; (4) the position of Procter in other markets; and (5) the nature of the "economies" enabled by the merger.

First. An important consideration is the very great discrepancy in size between Procter and, not only Clorox, but any firm in the liquid bleach industry. In 1957, Procter's sales of packaged detergents alone were 10 times the total sales of Clorox and 8 times the total sales of all of Purex's products combined. Procter's total sales were more than 20 times the total sales of Purex and more than 25 times the total sales of Clorox. In fact, Procter's advertising and sales promotion budget in 1957 was substantially larger than the combined total sales of Purex and Clorox, and very many times the size of Clorox's advertising budget. Such comparisons could be multiplied; they show plainly that Procter is of a different order of magnitude from that of the principal firms in the liquid bleach industry. Indeed, as has been observed, Procter's financial resources and scale of operations overshadow the entire liquid bleach industry.

A size disparity of this magnitude is significant in several ways. First, it is a reliable indicator that the cost advantages enabled by the merger will be substantial and will substantially affect competitive conditions in the market. It would not be practicable to attempt a full-scale cost study of the firms involved in a merger, with a view toward predicting the actual, quantitative impact of the merger on competition. See Bok, *supra* note 18, at 285-86. We must make do, as has been pointed out, with less exacting but nonetheless useful working criteria; and in the circumstances involved in this case, the scale relationship between

the acquiring firm and the principal firms in the relevant market is such a criterion. A merger between Clorox and, say, Purex might not enable substantial cost advantages, since Purex is not very much larger than Clorox; and the acquisition by Procter of, say, a small automobile manufacturer, even if the acquisition enabled substantial cost savings, would not be likely to impart a decisive competitive advantage to the acquired firm, given the scale of its competitors. But we have in this case a situation in which the pooling of expenditures by the merging firms places the acquired firm in a size class many times greater than that in which its own expenditures placed it and many times greater than that of *any* of its competitors. The inference is warranted, therefore, that the effect of this merger is to enable substantial cost savings which impart a substantial competitive advantage to the acquired firm.

To be sure, we might hesitate to draw such an inference in the case of a merger between firms in unrelated industries, or where the obtaining of cost advantages as a result of the merger depended on complex technological factors. But it has been found that Procter and Clorox are functionally closely related firms, the integration of whose marketing activities is not at all a remote hypothesis. And we have found also that the most substantial cost savings obtainable as a result of the merger, savings in the cost of advertising, depend principally on nothing more arcane than the total amount of the pooled expenditures for advertising on a particular network or in a particular magazine.

Second, the size disparity of the acquiring firm vis-à-vis the firms in the relevant market has an obvious materiality where, as here, that market is strongly marked by product differentiation through mass

advertising. The effectiveness of advertising, we have seen, is a function in part of sheer weight, of the sheer volume of a firm's expenditures for advertising. It is therefore intensely relevant not only that Procter must in absolute terms be deemed a large and affluent corporation well able to finance large advertising campaigns, but, more important, that the firms in the liquid bleach industry are decidedly small and weak *relative* to Procter.

Third, size disparity of the unusual degree involved in this case takes on special significance in light of Congress' expressed concern, in amending Section 7, with the preservation, to the extent practicable and consistent with economic and social progress, of competitive opportunities for small business.

Prior to the advent of Procter, household liquid bleach was basically a small-firm industry. The industry's total sales were less than $100,000,000 annually (i.e., less than 10% of Proctor's total sales); many very small firms, perhaps as many as 200, were active in the industry; and the low costs of manufacturing enabled a firm to produce liquid bleach with a relatively small capital investment. Clorox, to be sure, overshadowed the other firms in the industry, but with assets of only $12,600,000, Clorox itself could hardly be regarded as more than a small medium-sized firm. The distinctive nature of the industry threatens now to be utterly transformed by the substitution, for Clorox, of a billion-dollar corporation. Not only does Procter's great size and wide experience permit advertising and sales promotions on a scale hitherto unknown in the liquid bleach industry, but the remaining firms may now be motivated to seek affiliation by merger with giant companies. The practical tendency of the instant merger, then, is to trans-

form the liquid bleach industry into an arena of big business competition only, with the few small firms that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals.

To be sure, there may be firms in this industry that are so small—firms with a purely neighborhood business which engage only in local advertising—as to be relatively unaffected by the substitution of Procter for Clorox, although such firms might very likely be the first casualties in any attempt by Procter to increase Clorox's market position through enhanced advertising or other marketing activities. Nevertheless, in the range between these very small firms, at the lower end, and Clorox, at the upper end, are to be found a number of relatively small firms whose continued existence as independent entities is gravely threatened by this merger.

Precisely this phenomenon, the transformation through mergers of a small-business into a big-business industry, was at the heart of Congress' concern with what it conceived to be an accelerating trend toward excessive concentration of economic power. In the deliberations leading to the amendment of Section 7, illustration after illustration was cited of industries, formerly characterized by the vigorous competition of small firms on a footing of approximate equality, transmuted by mergers into arenas of "monopolistic competition".[44] This manifest Congressional policy has a place in the enforcement of Section 7, and it cannot be disregarded in the instant case, where

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[44] See, e.g., H.R. Rep. No. 1191, 81st Cong., 1st Sess. 3 (1949); Mergers and Superconcentration: Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms, *op. cit. supra* note 13, at 15.

over 100 small firms, most with assets of less than $75,000—not to mention prospective small-firm entrants—must now contend with Procter's vast, wide-flung enterprise. In this respect, we may compare the Supreme Court's *Brown Shoe* decision, holding unlawful a merger that did not itself create or aggravate an oligopolistic market structure, but, rather, was feared to be the first step in the transformation of a traditionally small-business, atomistic industry into one dominated by corporate giants.[45]

It should be very clear that, in deeming Procter's size a pertinent consideration in the decision of this case, we are most emphatically *not* adopting any view that bigness *per se* is anti-competitive or undesirable and should be attacked under Section 7 or any other antitrust statute. Procter's size is significant in this case only insofar as it is hugely disparate compared with the size of the firms in the relevant market. Disparity of size, not absolute size, has importance in a merger case of this kind. Moreover, we do not suggest that size disparity is relevant to the decision of every merger case. Quite possibly, there are industries in which size disparity has little or no competitive significance. But we are dealing, in this case, with an industry in which advertising figures very prominently as a factor in competition. And not only is effective advertising at least a partial function of sheer weight (and may, indeed, only be fully practical for a large regional or national seller), which in turn is a function of the financial scale and capacity of the advertiser, but the discount structure of the

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[45] See Adelman, *supra* note 12, at 241; Dean, *What the Courts Are Deciding: An Economist's View*, in The Climate of Antitrust—Second Conference on Antitrust in an Expanding Economy 23, 35 (National Industrial Conf. Bd. ed. 1963).

advertising industry favors very large, national advertisers to an unusual extent. As we have seen, a multi-million dollar diversified firm such as Purex may not be able to qualify for substantial advertising discounts, while a firm the size of Procter can qualify for very substantial such discounts indeed. Size, then, is a factor bearing significantly on competition in the special circumstances of this case, and we need not, and do not, have occasion to expatiate in general terms on the significance of bigness in the application of Section 7 and other antitrust statutes.

Second. Our conclusion, in the foregoing discussion, that liquid bleach is an industry in which Congress would not have wished to see domination by large firms, and that the size disparity of Procter vis-a-vis the small firms of the industry is likely to have a significant effect on the competitive structure of the industry, is not, we think, affected by the fact that, at the time of the acquisition, the market structure of the industry, from the standpoint of the maintenance of a competitive regime, was already decidedly unhealthy. On the contrary, this factor has positive weight in our determination that the merger is unlawful. As the Supreme Court has stated, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank, supra,* at 365, n. 42. A merger that aggravates an already oligopolistic market structure, not by affecting the concentration ratio, as was the case in *Philadelphia National Bank,* but by affecting some other market structure variable, such as condition of entry, is highly suspect under Section 7.

It is arguable, to be sure, that the market structure of the liquid bleach industry was already so inaus-

picious that the substitution of Procter for Clorox cannot have made things worse, that to a firm with resources of a million dollars or less, confined to a small regional market, the difference between a Clorox and a Procter as a competitor must be largely academic. Whatever deleterious effect on competition Procter's entry into an atomistic market might have had, it might be argued, its entry into a market dominated by one firm, by purchase of that firm, could have had no measurable such effect: the market was already rigidly non-competitive.

We are not persuaded by this argument. Despite Clorox's ascendancy, competition has never been wholly absent from the liquid bleach industry. The industry's non-competitiveness has always been relative, rather than absolute. The record is replete with instances of local often intense, price rivalry (for example, the Erie, Pennsylvania, incident) and other kinds of competition (for example, in container design). The substitution of Procter for Clorox, by lending further rigidity to an already oligopolistic industry, could eliminate what competition remains.[46] Even if Procter's entry into the industry by purchase of Clorox has no immediate impact on competitive behavior, which is by no means clear, it must eliminate virtually all possibility of an eventual movement toward deconcentration in the liquid bleach industry. The barriers to entry, already formidable, become virtually insurmountable when the prospective entrant must reckon not with Clorox, but with Procter.

In addition, by taking the place of Clorox, the dominant firm in the highly concentrated liquid bleach

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[46] See *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided November 15, 1962), p. 21; Bok, *supra* note 18, at 310; Blair, *supra*, p. [103], at 693.

industry, Procter obtains a protected market position built up by Clorox over many years, and, by virtue of Clorox's position of strength in the industry, Procter may be able to strengthen its position in other markets. Economists teach that the possession of market power enables a firm to derive higher profits ("monopoly profits") from its activities in the market than it could under more competitive conditions; the additional profits, in turn, endow the firm with added power to meet its rivals in other markets. In this fashion, substantial market power, which Clorox, as the dominant firm in an oligopolistic market, seems clearly to possess, is transferable as between seemingly unrelated indsutries.[47] This kind of leverage has long been familiar in many contexts of anti-trust enforcement. See, e.g., *United States* v. *New York Great A. & P. Tea Co.*, 173 F.2d 79, 86-87 (7th Cir. 1949). For example, it is one of the premises upon which various forms of vertical integration have been held unlawful. See, e.g., *Reynolds Metals Co.* v. *F.T.C.*, 309 F.2d 223 (D.C. Cir. 1962). It was recently deemed material in a Section 7 proceeding involving a market-extension merger. *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962), p. 44.

Since Procter is already a leading manufacturer of a number of products, its acquisition of Clorox, by strengthening Procter's aggregate market position, may lead to an impairment of competition in many industries besides liquid bleach. And since Clorox

[47] See Burns, The Decline of Competition 458 (1963); Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 142-150 (1954); Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 45-46 (1949); Stigler, *supra* note 36, at 184; *Blair, supra* p. [103], at 686-87; Comment, 72 Yale L. J. 1265, 1269, n. 22, 1270, no. 28 (1963).

and Procter are engaged in the manufacture of closely related products, more direct possibilities of exploiting in other markets Clorox's substantial market power arise—for example, the use of Clorox bleach, as a tying product, loss leader, or cross-coupon offering, in connection with efforts to promote other Procter products. These too are forms of extending monopoly or market power that have long been familiar in antitrust enforcement. See, e.g., *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1. The president of Procter put the matter succinctly: "We may be able to derive additional value from the Clorox name for other new and related products." Purex, for example, is already hard pressed to compete effectively with Clorox in the liquid bleach industry and with Procter in the abrasive cleanser, packaged detergent, and toilet soap industries; it may find itself in a powerful competitive pincers as the result of the fusion of its leading rivals in the several industries in which it is active.

Moreover, it would be a curious result, and one hard to reconcile with the Supreme Court's emphasis on the importance of fostering deconcentration in an already unduly concentrated industry,[48] for this Commission to hold that a firm, if it succeeds in dominating, and substantially eliminating competition in, its own market, thereby becomes freely salable at a high premium to a giant conglomerate enterprise. For the Commission to conclude that the acquisition of a firm which has successfully snuffed out most of the competitive vigor in its market raises no question under Section 7, would be to provide an incentive to firms to achieve market dominance in order to become at-

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[48] See [p. 111] above. Cf. Edwards, Big Business and the Policy of Competition 125 (1956).

tractive offerings to the large conglomerate corporations.

In light of these considerations, we are persuaded that a merger involving a leading firm in a market that is already well on the way to a non-competitive structure may be unlawful under Section 7 even where the aggravation of non-competitive market conditions by the merger may seem relatively slight because of the already advanced oligopoly condition of the market. Perhaps conceptual difficulties are encountered if such a merger is deemed to violate Section 7's "substantially to lessen competition" clause, since effective competition may already have substantially disappeared. If so, resort may be had, with entire propriety, to the statute's tendency-to-monopoly clause. For, " 'tend to create a monopoly' clearly includes aggravation of an existing oligopoly situation." *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D. N.Y. 1958). See Blair, *supra* p. [103], at 699-700. Cf. p. [74], n. 23 above.

Third. A factor closely related to the foregoing is that the merger eliminates the salutary effect of Procter as a *potential* competitor of Clorox in liquid bleach. At the time of the merger, Procter was a progressive and experienced manufacturer of many products in the same product line as liquid bleach; it had in the past frequently extended its product line by introducing a new brand in an industry in which it had not theretofore been active; it was one of the very few manufacturers of household products in the same general line as liquid bleach that was powerful enough to challenge, with some hope of success, Clorox's entrenched position in the bleach market; and it had actually pondered the possibility of entry into the liquid bleach market on its own. By virtue of all these facts, Procter must have figured as a tangible

influence on Clorox's policies until the merger eliminated it as a potential competitor. Procter, though *in absentia*, was nonetheless, by reason of its proximity, size, and probable line of growth, a substantial competitive factor in the liquid bleach market. We have said that the possibility of new entry may exercise a restraining influence upon oligopolistic firms, inclining them to maintain prices at a level low enough to discourage entry. Prior to the merger, Procter was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect. Once the threat of Procter's entry vanished, one of the last factors tending to preserve a modicum of competitive pricing and business policies in the liquid bleach industry was removed. As the Commission, in a related context, has had occasion to observe, "When market concentration is high, the main, and sometimes the only, restraint on the use of market power by oligopolistic sellers is potential competition." *Foremost Dairies, Inc., supra*, at 50.

We have no occasion to speculate on such questions as whether or not Procter, had its acquisition of Clorox been blocked, would in fact have entered the bleach industry on its own, or whether or not, had it done so, the result would have been to increase competition in the industry—although, with reference to the second question, we note the Supreme Court's recent observation that "one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra*, at 370. See Kaysen and Turner, Antitrust Policy 135 (1959). It is sufficient that the tangible possibility of Procter's entry on its own into the liquid bleach industry was a continuing and important pro-competitive influence in that industry, and that the acquisition of

Clorox, by eliminating that possibility, thereby removed a critical check on the power of Clorox to stifle effective competition in the sale of household liquid bleach.

Fourth. Another factor which supports a finding that this merger is illegal is Procter's strong market position in other (and larger) industries, notably packaged detergents, which we have already mentioned. No rigorous analysis of market structure in the other industries in which Procter is active was attempted in this case. It would be impractical, in light of the critical importance of channeling Section 7 proceedings within reasonable bounds of simplicity, to undertake, in every case of a conglomerate merger, a comprehensive study of each market in which the conglomerate enterprise operates. But, if we are not entitled to infer that Procter is able to subsidize Clorox's activities in the liquid bleach market out of "monopoly profits" (including profits attributable to market power short of outright monopoly) gleaned by Procter from its activities in other markets, or otherwise to transfer monopoly or market power enjoyed in other markets into the bleach market (see p. [114] above), we at least know, from the record of this case, that Procter is well established in a number of separate product markets (see [p. 57], n. 4 and pp. [57-58] above). We know, for example, that Procter possesses a 54.5% share of one market, packaged detergents, in which three firms account for 80% of total sales and which we earlier found (see pp. [63-64] above) closely resembles the household liquid bleach industry. On these facts, it is scarcely to be doubted that Procter, the biggest of the "Big Three" of the household cleansing agents industry, possesses some degree of market power in the packaged detergent and other product markets within the general

field, although perhaps not so much as Clorox possesses in its market.

At the least, Procter's manifest strength in markets other than liquid bleach rebuts any inference that Procter cannot wield the advantages that flow both from its own financial size and strength and from the dominant position in the liquid bleach industry enjoyed by Clorox. If Procter were shown to be spread thin throughout its many fields of endeavor, the significance of its apparently decisive competitive advantage over its liquid bleach competitors might be impaired; but that, clearly, is not the case.

Procter's strength in other markets may have, as well, a positive—though by no means conclusive—significance in appraising the effect of this merger on competition in the liquid bleach market. Even if such strength has not been proved to reach the level at which monopoly profits or other fruits of great market power are forthcoming, it is relevant to the psychological response of the members of the liquid bleach industry to Procter as a competitor. To the extent that Procter is thought by them to be not only a large and affluent firm, but also a powerful firm, in terms of market power enjoyed in related markets and possibly transferable into the bleach market, its prowess as a competitor gains an added and even sinister dimension in the eyes of its liquid bleach rivals—a factor of considerable importance to the impact of the merger on competition in the bleach industry. Cf. Blair, *supra* p. [103], at 690; Edwards, *supra* n. 22, at 335-36.

Thus, just as ownership of Clorox may enable Procter to enhance its competitive edge in other markets, so Procter's position in other markets may enhance its dominance, through its acquisition of Clorox, of the liquid bleach industry. Purex, we noted,

now competes with Procter in the liquid bleach as well as in the packaged detergents industry, and it may be inclined to act cautiously in the liquid bleach market for fear of provoking Procter's retaliation along the whole front of Purex's activities.

The short of it is that a conglomerate merger involving firms which have dominant power in their respective markets tends to reinforce and augment such power. Procter's willingness to pay a very substantial amount of money for the good will of Clorox bespeaks its ability, as a large and diversified firm which has seemingly exhausted the possibilities of further expansion in the numerous markets in which it has won a dominant position, to use the ample surplus it has accumulated in the process in order to achieve dominance in still another market by purchase of that market's dominant firm.[49] We emphasize here that we are discussing only corporate expansions through *acquisition*, and not through internal growth. In enacting Section 7, which deals only with mergers, Congress was expressing its special concern with those *acquisitions* which result in the mutual entrenchment of unhealthy market situations, and thus bear grave consequences for the future of our competitive economy.

Fifth. In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry,

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[49] See Klaw, "The Soap Wars: A Strategic Analysis". *Fortune,* June 1963, pp. 122, 198; *Blair, supra* p. [103], at 693; Bogis, *Merger Movements in Industry—The Diversification Threat,* 13 Cartel 32, 37 (Jan. 1963). In this connection we note that between 1955 and 1957, Procter acquired, besides Clorox, a manufacturer of paper products and several manufacturers of food products, for a total consideration, in cash and stock, of about $30,000,000.

and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies". The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition. As the Supreme Court has held (see pp. [68-69] above), Congress did not mean the adjudicators of Section 7 cases to attempt to weigh the ultimate social and economic merits and demerits of a merger, but only to determine its effect on competition and monopoly. A merger that results in increased efficiency of production, distribution or marketing may, in certain cases, increase the vigor of competition in the relevant market.[50] But the cost savings made possible by the instant merger serve, we have seen, not to promote competition, but only to increase the barriers to new entry into the relevant market, and thereby impair competition.

A more complete answer to the argument that this merger should be upheld on account of its "efficiencies" is that cost advantages of scale are of more than one kind, and that the kind involved in this merger, far from representing a net social benefit, is inde-

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[50] However, the danger is very great that where any two firms in an oligopolistic market merge, the fruits of the merger will be used not to enhance, but to retard, competition. See *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 399-400 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958); Comment, 68 Yale L. J. 1627, 1674 (1959).

pendently offensive to at least the spirit, if not the letter, of the antitrust laws. For one thing, the savings chiefly involved here, which are savings in advertising and sales promotions (Procter does not contend that the merger will enable substantial economies of production or physical distribution), are, it seems, achievable only by firms of very large absolute size. See Bain, Industrial Organization 170, 172-73 (1959). When we reflect that a firm, Purex, with total sales of almost $50,000,000 in 1957 and a proportionally large advertising budget, was evidently unable to obtain any but the minimum volume discounts available to large television advertisers, we can only conclude that the large-scale advertising "economies" involved in this case represent price concessions available only to giant firms, and bear little relationship to ordinary notions of economic "efficiency".

More important, while we do not doubt that marketing economies, including those of advertising and sales promotion, are as socially desirable as economies in production and physical distribution, there does reach a point "at which product differentiation ceases to promote welfare and becomes wasteful, or mass advertising loses its informative aspect and merely entrenches market leaders."[51] We think that point has been reached in the household liquid bleach industry. In short, the kind of "efficiency" and "economy" produced by this merger is precisely the kind that—in the short as well as the long run—hurts, not helps, a competitive economy and burdens, not benefits, the consuming public.

Advertising performs a socially and economically useful function insofar as it educates the consumer to the broad range of product alternatives, that he

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[51] Dirlam, *supra* note 13, at 103.

should consider in seeking to make an optimal allocation of his necessarily limited economic resources. Advertising, then, should stimulate competition and, by increasing the sales of the advertised product, lower the unit cost of that product. But this process is distorted in the case of a homogeneous product, such as household liquid bleach, produced under conditions of oligopoly, such as obtain in the liquid bleach industry. Since there is no reason (save cheapness and availability) for a consumer to prefer one brand of liquid bleach over another, there is no real need for the various manufacturers to incur as heavy advertising expenses as they do—except to protect their market shares. Heavy advertising, under such conditions, does not, in any meaningful sense, serve to broaden the consumer's range of product alternatives. Moreover, since oligopolists typically refrain from price competition, large advertising expenditures in the liquid bleach industry have not resulted in a lower unit price to the consumer. (Clorox, the most extensively advertised liquid bleach, is also the most expensive for the consumer.) Thus we have a situation in which heavy advertising benefits the consumer, who pays for such advertising in the form of higher price for the product, not at all.[52]

This situation is simply an example of a latent ambiguity in the term "competition". All forms of business rivalry are, in a sense, "competition", but not necessarily in the sense contemplated by Section 7 and the other antitrust laws. Price cutting is normally a manifestation of healthy competition. Predatory price cutting, however, is not. It tends to stifle true competition, and is often itself a violation of the

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[52] See Taplin, Advertising: A New Approach 107-110 (1963); Blair, *supra* p. [103], at 681.

antitrust laws. Similarly, sellers who vie with one another, through advertising and other promotional activities, to create a consumer preference for their brands, may be laudably engaged in competition such as the antitrust laws are intended to protect. On the other hand, such sellers may, as here, be engaged in brand "competition" to the end only of maintaining high prices, discouraging new entry, and, in general, impairing, not promoting, socially useful competition.

In sum, the undue emphasis on advertising which characterizes the liquid bleach industry is itself a symptom of and a contributing cause to the sickness of competition in the industry. Price competition, beneficial to the consumer, has given way to brand competition in a form beneficial only to the seller. In such an industry, cost advantages that enable still more intensive advertising only impair price competition further; they do not benefit the consumer.

E. *Post-Acquisition Evidence*

In holding this merger unlawful under Section 7, we expressly decline to place reliance on certain facts which, in the view of the hearing examiner, helped demonstrate the merger's unlawfulness. It should be noted that the hearings in this case were conducted for the most part, under the aegis of the Commission's decision in *Pillsbury Mills, Inc.*, 50 F.T.C. 555. Experience in the trial of merger cases, now confirmed by the Supreme Court, has exposed the fallacy of supposing that a broad-gauged inquiry into every business and economic fact remotely relevant to the economic effect of a merger—the kind of inquiry the Commission in *Pillsbury Mills* held it must undertake under Section 7—is productive of more rational decisions. Broad principles of relevancy and materi-

ality may have been appropriate when the law of Section 7 was still fluid and unsettled, but it is now clear that the path toward just and effective enforcement of the statute lies in the direction of narrowing the scope of necessary or permissible inquiry.

In the particular circumstances here, most of the considerable amount of post-acquisition evidence introduced at the hearings was entitled to little weight. We have already canvassed the considerations that make such evidence rarely of much probative value (see pp. [87-89] above); suffice it to say that those considerations are applicable in this case. Were the post-acquisition evidence in this case to be considered, it might furnish some support for the finding we have made wholly on the basis of other factors. Since the merger, Clorox's market share has continued to increase. In 1961, Clorox's overall market share was 51.5% as compared to 48.8% in 1957, while its share in, for example, the New England region, had risen in this period from 56% to 67.5%. Procter has introduced sales promotions on a fairly large scale ($2,000,000 in four years) in behalf of Clorox. Purex has acquired the fourth largest liquid bleach producer (thus increasing concentration in the industry), after, and according to an official of Purex, in part because of, losing a "brand war" to Clorox-Procter in Erie, Pennsylvania. And Procter has obtained, for Clorox, certain advertising economies. None of these phenomena, we think, proves that the merger is unlawful, for it is difficult to know to what extent they were produced by the merger, and not by other factors. However, if we were to consider them, we would have to find that they corroborated or confirmed the conclusion of illegality grounded in solid evidence of the structure of the market at the time of the merger.

Had Procter in fact fully integrated the marketing and other activities of Clorox in its overall organization, perhaps dramatic post-acquisition changes, directly traceable to the merger, would have occurred. But, save for taking advantage of certain advertising cost advantages and introducing sales promotions, Procter in the period covered by the post-acquisition evidence has carefully refrained from changing the nature of the Clorox operation; even the network of independent brokers has been retained. Such restraint appears to be motivated by a general Procter policy of moving slowly and cautiously in a new field until the Procter management feels totally acclimated to it. It is possible, as well, that the pendency of the instant proceeding has had a deterrent effect upon expansionist activities by Procter in the liquid bleach industry.

Most important, however, so far as post-acquisition evidence in this case is concerned, is the fact that there has been no dramatic change in market structure or behavior in the years since the merger. This means that there is no reason to suppose that an analysis based upon market structure at the time of the merger need be reexamined, qualified or discarded in the light of subsequent events. Where, as here, the period since the acquisition has been relatively uneventful, there is certainly no basis for according particular weight to the post-acquisition evidence that found its way, needlessly, into the record.

IV. *Relief*

The last point to be considered is the nature of the relief to be ordered. The order in the initial decision would require respondent to divest itself of the acquired assets through sale. Respondent raises two main objections to this order.

First, it contends that divestiture is not called for in these circumstances, because the public interest can be protected by an order enjoining Procter from exercising the opportunities for enhancing Clorox's dominance of the liquid bleach industry which the Commission has found resulted from the merger. It is settled, however, that divestiture is normally the appropriate remedy in a Section 7 proceeding. *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316. This case would be a particularly inappropriate one in which to make an exception. The anti-competitive effects of this acquisition are not enjoinable. They inhere in the very presence of Procter, standing in the place of Clorox in the liquid bleach industry, and can be corrected only by restoration of the market structure, so far as possible, as it existed at the time of the acquisition.

Second, respondent objects to the provision in the order entered by the hearing examiner that sale of the acquired assets cannot be made to anyone "who is at the time of divestiture, or for two years before said date was, a stockholder . . ." of Procter. Recognizing that the purpose of a Section 7 proceeding is in no sense punitive, that the sale of an absorbed firm may be difficult to accomplish within a reasonable period of time, and that in the case of a large publicly-owned corporation the common ownership by the shareholders of both the acquired and the acquiring firms is not necessarily inconsistent with a meaningful separation of the firms, the Commission recently approved an order permitting a Section 7 respondent to spin off the acquired assets to a new corporation, the stock of which would then be distributed to the shareholders of respondent. *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided Nov. 15, 1962), p. 22; see *id.*, Memorandum Accompanying Final

Order (issued March 22, 1963). There is no apparent reason why this respondent should not be permitted thus to spin off the acquired assets to a new corporation or corporations, if it so desires, and we have modified the order entered by the hearing examiner accordingly.

Commissioner Anderson concurs in the result.

November 26, 1963

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